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SUPREME COURT, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

72-950

CLYDE W. REED - - - - - - - Petitioner

versus

JEAN MOORE REED - - - - - Respondent

PETITION FOR CERTIORARI TO THE KENTUCKY COURT OF APPEALS

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

CLYDE W. REED - - - - - - - *Petitioner*

v.

JEAN MOORE REED - - - - - - *Respondent*

PETITION FOR WRIT OF CERTIORARI

REFERENCE TO OPINIONS DELIVERED IN COURTS BELOW

The first opinion in Marshall Circuit Court, the Court of original jurisdiction, has not been reported. It is attached as Appendix "A".

The first opinion in the Court of Appeals of Kentucky is reported as *Reed* v. *Reed,* Ky., 457 S. W. 2d 4 (1970), and is attached as Appendix "B".

The second opinion in Marshall Circuit Court, the Court of original jurisdiction, has not been reported. It is attached as Appendix "C".

The second opinion in the Court of Appeals of Kentucky is reported as *Reed* v. *Reed,* Ky., 484 S. W. 2d 844 (1972), and is attached as Appendix "D".

STATEMENT OF JURISDICTIONAL GROUNDS

The jurisdiction of this Court is invoked pursua to Section 1257(3) of the Judicial Code (28 U.S 1257(3)), in that petitioner has been deprived of rights and property without due process of law in v lation of the Fifth and Fourteenth Amendments to Constitution of the United States.

(i) The judgment or decree sought to be review was dated October 6, 1972, and the mandate was issu October 12, 1972.

(ii) The execution and enforcement of the ma date of the Court of Appeals of Kentucky was stay for a period of 90 days from October 25, 1972, by ord of Honorable Scott Reed, Judge, Court of Appeals Kentucky, dated October 25, 1972, which is attach hereto as Appendix "E".

(iii) Jurisdiction to review the judgment or dec in question by writ of certiorari is conferred upon t Court by Section 1257(3) of the Judicial Code (U.S.C. 1257(3)).

QUESTIONS PRESENTED FOR REVIEW

1. Was petitioner denied due process and eq protection when the Kentucky Court of Appeals fused to grant him a hearing on his motion to vac or modify an alimony judgment having prospective a plication?

2. Was it a denial of due process to refuse pe tioner a hearing on his claim that changes in circu

stances since entry of the original judgment warranted vacating or modifying future alimony payments?

3. Was it a denial of due process and equal protection when the Kentucky Court of Appeals, after overruling prior decisions, refused to grant petitioner a hearing on his claim that the new decision should be made applicable to future alimony payments?

APPLICABLE CONSTITUTIONAL PROVISIONS

The applicable provisions of the United States Constitution are:

> *Amendment V* — No person shall be held to answer for capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.
>
> *Amendment XIV, Section I* — All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Stage of Proceedings

The Court of Appeals of Kentucky affirmed the order of the Chancellor denying, on jurisdictional grounds alone, a hearing on petitioner's motion to vacate so much of an alimony judgment as has prospective application. This petition seeks review of such affirmance by the state court. The constitutional question was raised by petitioner in his motion before the Chancellor to vacate the judgment insofar as it ordered future alimony payments (Rec., p. 38).

Petitioner made no effort to disturb that part of the judgment ($550,000) which petitioner had paid prior to filing the motion. His request for a hearing had to do only with the unpaid future alimony payments. Thus, he does not seek to apply retroactively a change in the law made by the Kentucky Court of Appeals; he seeks only to apply the new law to *future* alimony payments.

The Chancellor refused to rule on the constitutional question raised in the motion. He simply denied a hearing for alleged lack of jurisdiction (although he specifically reserved jurisdiction for this purpose in his prior judgment). The Kentucky Court of Appeals also refused to consider the constitutional question, simply stating that if it granted a hearing on the motion "there is no certainty" that petitioner would prevail and, "It is quite possible" that petitioner would not prevail (App. "D", p. 81). Therefore, on Octo-

ber 6, 1972, it denied petitioner a hearing on the merits of his motion. Mandate issued on October 12, 1972, and its enforcement was stayed on October 25, 1972, for 90 days pending action on this petition (Appendix "E").

Statement of Material Facts

This petition involves an award of future alimony in a divorce case; however, we respectfully urge the Court to read further. Even divorced husbands, we submit, can be deprived of their property without due process of law.

The following facts are set forth in Chancellor's original Findings of Fact, Conclusions of Law and Judgment, (Appendix "A").

On April 25, 1967, respondent, Jean Moore Reed (herein referred to as Jean), sued petitioner, Clyde W. Reed (herein referred to as Clyde), for divorce in Marshall Circuit Court, alleging cruel and inhuman treatment (one of the statutory grounds for divorce contained in Kentucky Revised Statutes 403.020(3)(b)). She sought custody of the two infant children, division of accumulated property, and alimony. Clyde counterclaimed for divorce alleging Jean's cruel and inhuman treatment of him (KRS 403.020(4)(d)) and, by later amendment, alleging that Jean had abandoned him for more than one year (KRS 403.020(2)(a)).

The Chancellor determined that Jean, "an attractive, well groomed and personable woman, forty-two years of age" was not justified in deserting her 51 year old husband and alienating the infant children.

He noted the "utter cruelty" of this alienation; "the truth is that this father has been deprived of all association with his children for the better part of two years while residing some seven miles distance from them" (App. "A" p. 35).

The Chancellor then awarded the divorce to Clyde, finding that Jean was solely at fault in bringing about the broken home. The legal grounds for granting the divorce to Clyde was the "unjustified abandonment of defendant by plaintiff for a period of more than one (1) year" (App. "A", p. 24).

At that time, Kentucky law forbade the granting of alimony to a wife who is solely responsible for breaking up a home. The statute (KRS 403.060) read:

> (1) If the wife does not have sufficient estate of her own she may, *on a divorce obtained by her,* have such allowance out of that of her husband as the Court considers equitable; but no such allowance shall divest the husband of the fee simple titles to real estate. (Emphasis supplied herein unless otherwise noted.)

Despite this statute, the Chancellor ordered Clyde to pay Jean "lump sum alimony" of $500,000.00 and, in addition, periodic alimony of $25,000.00 per year for 10½ years.[1]

---

[1] "It is well settled by Kentucky law that where the wife is denied a divorce she is not entitled to alimony. *Axton* v. *Axton*, 182, Ky. 286, 206 S. W. 480; *Morris* v. *Morris*, 193 Ky. 189, 235 S. W. 358; *Taylor* v. *Taylor*, 273 Ky. 802, 117 S. W. 2d 983, *Wesley* v. *Wesley*, 181 Ky. 135, 204 S. W. 165." (*Belknap* v. *United States*, 55 F. Supp. 90, 98 (W. D. Ky., 1944)).

Clyde appealed to the Kentucky Court of Appeals, asserting, among other things, that the Chancellor lacked statutory power to award *any* alimony and, in any event, that the award was excessive. Jean cross-appealed, contending that the alimony award was inadequate. Jean's cross-appeal was dismissed on technical grounds. On Clyde's appeal, the Kentucky Court of Appeals in a 5-2 opinion affirmed the Chancellor in all major respects, merely modifying the lump sum award by specifying that it be paid $125,000.00 per year for 4 years beginning May 7, 1969, with 4% interest on the deferred installments (App. "B").

Two judges joined in a vigorous dissent, spotlighting the majority's open violation of unambiguous statutory law (Appendix "B").[2]

This opinion was rendered on June 26, 1970 (Appendix "B"). On August 7, 1970, Clyde, still firmly believing that the Court had acted entirely outside the law and still denying that five elected judges possessed the plenary right to disobey a validly enacted Act of the General Assembly, paid the $500,000.00 lump sum and the two accrued $25,000.00 annual installments.

Then, five months later, on November 27, 1970, the same Court of Appeals in *Colley* v. *Colley,* Ky., 460 S. W. 2d 821 (1970), a case that was actually pending before it when *Reed* v. *Reed* was decided, acknowledged

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[2]The dissenting judges referred to the statute which authorized the award of alimony *only* if the divorce were "obtained by her" and only if she "does not have sufficient estate of her own". They said, "It is the law and it will remain the law upon this subject until the legislature changes it. Ten thousand judicial opinions saying otherwise will not make it less so." (Appendix "B" p 73).

that it had been guilty of "the judicial repeal of part of the alimony statute", and had created "contradictory, confusing and unrealistic . . . case law", resulting in "inconsistent, fiction-ridden and unsatisfactory . . . pronouncements". It asserted that from then on, the law would be that after the Chancellor had decided upon a division of property acquired by the husband and wife team "then the separate question of permanent alimony must be faced. At that point, the approach changes. Fault becomes a factor. Is the wife entitled to a divorce? If she is not, then she is not entitled to permanent alimony" (460 S. W. 2d 821, 827).

Thus, five months after the Court of Appeals entered judgment against Clyde for $762,600, it declared that $262,500 of the judgment (alimony of $25,000.00 per year for 10½ years) was contrary to law. This is precisely what Clyde had argued. It was precisely what the minority had written.

Clyde promptly moved the trial court to vacate so much of the judgment as had *prospective* application, i.e. the $25,000 annual alimony installments for the next 8½ years. He alleged that the judgment for future alimony was beyond the power of the Court to enforce; that its enforcement would deprive Clyde of his property without due process of law in violation of the Fifth and Fourteenth Amendments; that the award was "manifestly so unfair and unjust as to amount to a travesty"; and that drastic changes in circumstances occurring since entry of the judgment made the judgment for future alimony "so grossly unfair as to shock the conscience". This motion was amended so as to

assert that "in view of . . . the changes in circumstances which have occurred subsequent to entry of the judgment, it is no longer equitable that the judgment should have prospective application, and, therefore, it should be set aside under CR 60.02(5)" (Rec., pp. 38, 39, 44). He sought a hearing on his motion in order to show the marked changes in the financial postures of the two parties, his serious illness, the bitterness of his children's hostility as engendered by Jean, and other facts which would show the gross inequity of enforcing the annual alimony payments.

Jean replied that since the Court of Appeals had passed upon the award of future alimony in the original appeal, the trial court possessed no jurisdiction even to grant a hearing on Clyde's motion. The trial court agreed that only the Court of Appeals could consider Clyde's motion, ignoring the facts that (a) in its "Agreed Order" dated August 7, 1970, the Chancellor expressly *retained* jurisdiction for that purpose;[3] (b) Rules 60.02(5) and (6) of the Kentucky Rules of Civil Procedure specifically vested the Chancellor with such jurisdiction;[4] and (c) historically, executory periodic

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[3]"This cause is now stricken, settled in full, including satisfaction in full of the judgment, with the exception of said future alimony payments; *but this Court retains jurisdiction of the parties and of the subject matter of this action for any and all* necessary and proper orders relative to the future alimony payments." (Rec. p. 34).

[4]Rules 60.02(5) and (6) of the Kentucky Rules of Civil Procedure provides:

"On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds:

(Footnote continued on following page.)

alimony had always been considered subject to modification by the Chancellor because of changes in circumstances.

Clyde sought review of the Chancellor's order by the Kentucky Court of Appeals contending, of course, that the Chancellor possessed jurisdiction to hear the merits of Clyde's motion. The Court of Appeals affirmed the Chancellor's denial of a hearing in an opinion which a dissenting judge likened to "Alice in Wonderland" (App. "D", p. 88).

We submit that these decisions of the Chancellor and the Kentucky Court of Appeals were unbelievably arbitrary, denying Clyde due process and equal protection. Clyde, while he has enjoyed business successes, possesses only a fifth grade education. It is little wonder that he believes that courts in Kentucky lack essential impartiality; that judicial bias dictated decisions which apply one law to him and a different law to other litigants similarly situated.[5]

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(1) . . .
(2) . . .
(3) . . .
(4) . . .
(5) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, *or it is no longer equitable that the judgment should have prospective application;* or
(6) *any other reason of an extraordinary nature justifying relief."*

[5]In *Colley* the Court of Appeals said
We have also concluded that the time has arrived to correct, clarify, and restate the law in this jurisdiction applicable to the

(Footnote continued on following page.)

ARGUMENT

I

It Was a Denial of Due Process to Refuse Clyde a Hearing on His Motion to Vacate the Judgment Awarding Future Alimony to Jean

The motion before the Chancellor to vacate the judgment awarding future alimony payments to Jean was grounded upon:

> "(a) changes in circumstances which have occurred subsequent to entry of the judgment [because of which] it is no longer equitable that the judgment have prospective application" (Rec., p. 44).
>
> "(b) The judgment of February 7, 1969, ordering Clyde to pay Jean $25,000.00 on February 7, 1971, and annually thereafter for 9½ years as "deferred alimony" violates KRS 403.060, is beyond the statutory power of the Court to award, and is unconstitutional and void. Said judgment constitutes a deprivation of Clyde's property by the State without due process of law in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States" (Rec., p. 38).

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principal problems presented in the instant case (*Colley* v. *Colley*, Ky., 460 S. W. 2d 821, 823 (1970)).

The Court then declared that for the future, the law would be "Is the wife entitled to a divorce? If she is not, then she is not entitled to permanent alimony." (Ibid. p. 827).

Subsequently, the Court in a long, unbroken line of decisions, remanded a series of cases for trial court review in light of *Colley* (see *post*, p. 17). But it refused Clyde a hearing on his motion for review of future alimony payments on the same grounds.

"An attempt to justify the award on KRS 403.065 would likewise violate the Fifth and Fourteenth Amendments to the U. S. Constitution" (Rec., p. 39).

"(c) The $25,000.00 per year award should be set aside on the further ground that it is manifestly so unfair and unjust as to amount to a travesty. To award a guilty wife $25,000.00 per year alimony when she already has an estate in excess of one-half million dollars, an annual income of about $35,000.00 and furs, jewelry and a Lincoln Continental automobile (all given to her by Clyde before the separation) is so grossly unfair as to shock the conscience" (Rec., pp. 39, 40).

As stated, neither the Chancellor nor the Court of Appeals passed upon the constitutional issue. The Chancellor denied the motion solely on the ground that he had no discretion to grant it. He said:

> The Court is of the opinion, as stated above, that, once the decision of the Court of Appeals was rendered and the mandate to this Court issued, all discretionary powers inherently vested in the trial court were ended . . . Consequently, the provisions of CR 60.02 do not give this Court jurisdiction to now use discretionary powers to alter or modify that final judgment and decision of the Court of Appeals (App. "C", p. 77).[6]

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[6]This is a classic judicial cop-out. The jursidction of the Chancellor to set aside a judgment under CR 60.02 "if it is no longer equitable that the judgment should have prospective application" is not diminished simply because the judgment was af-

(Footnote continued on following page.)

The Chancellor then added:

> Obviously, recourse may be had by appeal from this order to determine whether the Court of Appeals now desires to amend its own decision and to make the remaining deferred payments to (sic) alimony subject to the rule which they later announced in the Colley decision (Appendix "C", p. 77).

The Court of Appeals had already announced that it would "not initially entertain such a motion" [under CR 60.02]. *Taylor* v. *Mills,* Ky., 320 S. W. 2d 111 (1958). Clyde's only avenue of relief was to seek appellate review of the order denying Clyde a hearing on the merits of his motion.

On review, the Court of Appeals held that Clyde would not be given a hearing on his motion. It never passed upon the constitutional issues. It ignored Clyde's contention that changed circumstances merited further judicial review of the justice of future alimony payments. It refused to apply the new law announced in *Colley* to the unexecuted portions of the judgment against Clyde, while insisting that *Colley* be applied to all other litigants similarly situated.

It is axiomatic that "the fundamental requisite of due process of law is the opportunity to be heard." *Grannis* v. *Ordean,* 234 U. S. 385, 394, 58 L. Ed. 1363,

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firmed previously by the Court of Appeals. *Fortney* v. *Mahan,* Ky., 302 S. W. 2d 842 (1957); *Averitte* v. *Hutchinson,* Ky., 420 S. W. 2d 581 (1967); *Burke* v. *Burke,* Ky., 248 S. W. 2d 716 (1952); *National Electric Service Corp.* v. *District 50, UMW,* Ky., 279 S. W. 2d 808 (1955). In *Taylor* v. *Mills, supra,* the judgment had been affirmed by the Court of Appeals *four* times, yet the Court said it could still be changed by the Chancellor under CR 60.02.

1369, 34 S. Ct. 779. The hearing must be "at a meaningful time and a meaningful manner." *Armstrong* v. *Manzo,* 380 U. S. 545, 552, 14 L. Ed. 2d 62, 66, 85 S. Ct. 1187; *Goldberg* v. *Kelly,* 397 U. S. 254, 267, 25 L. Ed. 2d 287, 299, 90 S. Ct. 1011.

> "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must be notified.' " *Fuentes* v. *Shevin,* ___ U. S. ___, 32 L. Ed. 2d 556, 559, 92 S. Ct. 1983.

Notification of a hearing without granting a hearing is a futile gesture. A hearing "appropriate to the nature of the case" is essential to procedural due process. *Mullane* v. *Central Hanover Trust Co.,* 339 U. S. 306, 313, 94 L. Ed 865, 873, 70 S. Ct. 652; *Fuentes* v. *Shevin, supra,* 32 L. Ed. 2d 556, 571.

Although 3½ years have passed since the judgment was entered, Jean remains a young, wealthy, attractive woman possessing furs, jewels, excellent health and lavish surroundings. In those 3½ years Clyde has become a sick and lonely man, deserted by his wife and regarded contemptuously by his children, who, immediately prior to the separation, were very close and affectionate to him. Procedural due process requires that he be given an evidentiary hearing, an opportunity to prove facts showing that the award of alimony of $25,000.00 per year to Jean for the next 8½ years is manifestly unjust.

It is only right that "persons forced to settle their claims of right and duty through the judicial process

must be given a meaningful opportunity to be heard." *Boddie* v. *Connecticut,* 401 U. S. 371, 377, 28 L. Ed. 2d 113, 118, 91 S. Ct. 780.

The Kentucky Court of Appeals in refusing to grant a hearing on Clyde's motion stated for the first time that the $25,000.00 annual installments represented "a plan for deferred payment of a fixed obligation" (App. "D", p. 81). As the dissent makes clear, this sudden decision (that what it previously called "alimony" was actually deferred payments of a fixed debt) sprang from "Alice in Wonderland" (App. "D", p. 88). The Court's main theme, however, was that a hearing probably would be unavailing to Clyde. It said that "there is no certainty" that Clyde would prevail, and that "it is quite possible" that he would not.

> The right to be heard does not depend upon an advance showing that one will surely prevail at a hearing. 'To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result. . . *Coe* v. *Armour Fertilizer Works,* 237 U. S. 413, 424; 59 L. Ed. 1027, 35 S. Ct. 625. (*Fuentes* v. *Shevin, supra,* 32 L. Ed. 556, 574).

Procedural due process has to do with the process of decision making, not with what decision should or may be made.

We respectfully submit that it was a denial of due process to deny Clyde a hearing and thus prohibit him from proving the drastic changes in circumstances and

conditions occurring since entry of the judgment which render it unjust and inequitable for him to continue paying Jean $25,000.00 per year. The effect of this denial, unless remedied by this Court, is to say that (a) there is no power on earth that can change this executory judgment; it is as inexorable as the sunrise; and (b) no matter how drastic the change in conditions, how ill or impecunious Clyde may become or how lavish and luxurious the status of Jean, Clyde must continue to pay her $25,000.00 per year or go to a debtor's prison until his contempt for non-payment is somehow purged.

II

It Was a Denial of Equal Protection to Apply the Colley Rule to All Other Litigants But Deny it to Clyde

In *Colley, supra,* the Court of Appeals, declaring that the time had come "to correct, clarify and restate the law in this jurisdiction", declared that henceforth KRS 403.060 would be enforced as it was written, i.e. no permanent alimony could be awarded to a wife who because of her own fault, is not entitled to a divorce. Immediately afterwards, the Court of Appeals remanded an unbroken series of cases because the courts below had departed from the new rule announced in *Colley*. *Goff* v. *Goff,* Ky., 481 S. W. 2d 80 (1972); *Noel* v. *Noel,* Ky., 481 S. W. 2d 46 (1972); *Petersen* v. *Petersen,* Ky., 479 S. W. 2d 892 (1972); *Coleman* v. *Coleman,* Ky., 479 S. W. 2d 602 (1971); *Dahlenburg* v. *Dahlenburg,* Ky., 479 S. W. 2d 606 (1972); *Moore* v. *Moore,* Ky., 477 S. W. 2d 792 (1972); *Clark* v. *Clark*

Ky., 471 S. W. 2d 740 (1971); *Howard* v. *Howard,* Ky., 469 S. W. 2d 353 (1971); *Penrod* v. *Penrod,* Ky., 463 S. W. 2d 309 (1971); *Thomas* v. *Thomas,* Ky., 464 S. W. 2d 257 (1971); *McCauley* v. *McCauley,* Ky., 467 S. W. 2d 359 (1971); *Beggs* v. *Beggs,* Ky., 479 S. W. 2d 598 (1972); *Chinn* v. *Chinn,* Ky., 480 S. W. 2d 157 (1972).

Typical is *Beggs* v. *Beggs, supra.* The case was remanded to the Chancellor for reconsideration in light of the new principles announced in *Colley*:

> "Upon conflicting testimony the trial court decided that Thomas was entitled to the divorce. We cannot say that Ruby was legally entitled to a divorce. Therefore, Ruby was not entitled to alimony. *Coleman* v. *Coleman,* 164 Ky. 709, 176 S. W. 186 (1915)." (479 S. W. 2d at 602).

Thus, the Court of Appeals has declared that an award of alimony to a wife solely at fault is contrary to law in all cases except Clyde's.

We respectfully submit that failure to grant Clyde a hearing on his motion denied him equal protection of the law. Only one guilty wife in Kentucky may continue to receive periodic alimony for the next 8½ years —Jean. Only one totally innocent husband must continue to pay alimony for the next 8½ years—Clyde.

III

The Constitutional Issue Was Timely Raised

Clyde raised the constitutional issue in his motion to vacate the executory portion of the judgment. The Chancellor did not rule on this issue, simply holding that he had no "discretionary power" to modify a judgment which had been affirmed by the Court of Appeals. The latter Court was requested to pass solely upon the question of the Chancellor's jurisdiction to grant a hearing. In holding that Clyde was not entitled to a hearing, it ignored the constitutional complaint made in the motion. The rule that a constitutional issue must specifically be decided by the lower court has no application if the decision below supplies "a new and unexpected basis for a claim by the defeated party of the denial of a Federal right." *Great Northern R. Co.* v. *Sunburst Oil Co.* 287 U. S. 358, 367, 77 L. Ed. 360, 368.

Clyde's complaint here is similar to that made in *Great Northern, supra,* i. e. the court below has adjudged the divorce statutes of Kentucky to mean one thing for Clyde and another thing for all others.

We are not unmindful of the rule in *Great Northern* that a state court may choose for itself whether, when it overrules prior decisions and makes new law, it will make the new law apply retroactively or prospectively. This, however, is not Clyde's complaint. He contends that the Court may not constitutionally apply the old law to him and the new law to all others. Clyde could not know that the lower court would do this until the decision was issued denying him a hearing on the merits

of his motion. Meanwhile, the Kentucky Court of Appeals had in many decisions declared that the new guidelines for alimony awards must be applied to all other litigants.

Neither are we unmindful of the general rule, as stated in *American Railway Exp. Co.* v. *Kentucky*, 273 U. S. 269, 71 L. Ed. 639, and in many other cases that this Court "must accept as controlling the decisions of the state courts upon questions of local law, both statutory and common" (273 U. S. at 272, 71 L. Ed. at 641). However, there is an exception to that general rule, and the exception applies to the instant case. It is: if the state court judgment "amounts to mere arbitrary or capricious exercise of power or is in clear conflict with those fundamental 'principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights,'" then this Court will step in to protect the individual citizen. *American Railway Express Co., supra*, 273 U. S. 270, 273, 71 L. Ed. 639, 641. "It is, however, established as a fundamental proposition that every state official, high and low, is bound by the Fourteenth and Fifteenth Amendments." *United States* v. *Raines*, 362 U. S. 17, 25, 4 L. Ed. 2d 524, 532, 80 S. Ct. 519.

We submit that, on balance, Clyde's constitutional right to be heard on his motion outweighs the rather ordinary costs in time, effort and expense of granting and conducting a hearing on the merits of his motion. See: *Bell* v. *Burson*, 402 U. S. 535, 540-541; 29 L. Ed. 2d 90, 95; 91 S. Ct. 1586; *Goldberg* v. *Kelly*, 397 U. S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011.

CONCLUSION

We respectfully submit that for some reason unknown to Clyde, the Kentucky Court has singled him out. He must continue to pay $25,000.00 per year to Jean regardless of his or her circumstances; he cannot be heard in court; no power on earth can grant him relief, or even an opportunity to prove his entitlement to it; Kentucky law applies uniformly to everyone except Clyde. Surely the 5th and 14th Amendments prohibit such treatment.

We respectfully petition the Court to grant certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I am a member of the bar of the United States Supreme Court; that I am entering my appearance as counsel for petitioner simultaneously with the filing of the foregoing Petition; and that I have served 3 copies of the foregoing Petition upon Honorable L. M. Tipton Reed, Lawpart Building, Mayfield, Kentucky 42066, and 3 copies upon Honorable William E. Scent, 621 Broadway, Paducah, Kentucky 42001, both addresses within 500 miles from the undersigned, by depositing same in the United States Post Office at Benton, Kentucky, first class postage prepaid, on December ____, 1972, all in accordance with Rule 33(1) of the Rules of the United States Supreme Court.

Dated this ____ day of December, 1972.

JOHN C. LOVETT
LOVETT and LEWIS
P. O. Box 165
Benton, Kentucky 42025

APPENDIX "A"

IN THE

MARSHALL CIRCUIT COURT

Civil Action File No. 2047

JEAN MOORE REED, - - - - - - - *Plaintiff,*

v.

CLYDE W. REED, - - - - - - - *Defendant.*

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

FINDINGS OF FACT.

The Pleadings. This action was commenced by the filing of a Complaint by the wife in this Court on April 25, 1967. In the Complaint, plaintiff sets up her marriage to the defendant; their separation; her cause for divorce alleging cruel and inhuman treatment on the part of the defendant such as to entitle plaintiff to a divorce under the provisions of Kentucky Revised Statutes 403.020(3) (b); seeks custody of the two infant children born of the marriage; requests alimony for the wife and support for the children pendente lite; and demands an allowance to her of permanent alimony in an amount equal to fifty (50) per cent of the property accumulated by the parties during the marriage.

Defendant husband answered the Complaint by denying plaintiff's allegations entitling her to a judgment of

divorce. The defendant counterclaimed, asserting his own cause of action for divorce because of plaintiff's alleged cruel and inhuman treatment of him [KRS 403.020(4)(d)] and further alleging that defendant was the proper person to be entrusted with the care and custody of the infant children. Thereafter, and with leave of Court, the defendant husband did on January 11, 1968, amend his Answer and Counterclaim to the extent of alleging an additional ground for divorce under the provisions of KRS 403.020(2)(a), abandonment by the wife for more than one (1) year.

The Marriage. The proof shows that the parties were married in Henderson County, Kentucky, on March 13, 1946, the wife being almost twenty (20) and the husband twenty-nine (29) years of age at the time of the marriage. Following the marriage, the parties lived in and around Providence, Kentucky, in Webster County, for the next three or four years while the husband was engaged in the trucking business in connection with the coal mining industry. In the year 1950, the husband moved to Marshall County, Kentucky, where he became engaged, at first on a rather modest scale, in the business of mining, crushing, processing and selling limestone rock. Although the wife remained in Webster County initially, this separation was unrelated to any domestic difficulty; and she, thereafter in 1952, joined her husband in Marshall County where they have lived and made their home from that time until the separation of the parties immediately prior to the filing of these proceedings.

The detailed and voluminous record that has been complied in this case is conclusive and uncontradicted that the defendant husband has always and even now continues to devote an almost unbelievable amount of his waking hours to the business that he operates. This record shows that throughout all of the period of the marriage he has had a habit of devoting not less than twelve and up to eighteen

hours of each day, seven days a week, to his business. It seems that his day's activities began at three or four o'clock in the morning and ended at six or seven o'clock in the evening. As will be seen from later findings made herein, the business of the husband has grown and prospered almost beyond belief. It is impossible for this Court or anyone else to determine whether the businesses of the husband could or would have grown and prospered to the extent that they have except for the time which the husband has devoted to them, almost to the total exclusion of his family or any other activity. The hours the husband devoted to his business quite naturally restricted and curtailed time and activities available to be devoted to what would be considered normal family activities. Both sides are in agreement that group activity as a family was throughout this marriage, limited to very occasional visits with friends for dinner on Saturday evening or a boat ride on Kentucky Lake on occasional Sunday afternoons. It appears, however, that even though the husband had little or no interest in extensive social activities with his family or friends of the family, the husband not only consented but was insistent at all times that the wife and children take whatever vacations they desired, either by themselves or with others whose companionship they enjoyed. The record indicates that this family has never acquired desires for unusually expensive or financially demanding tastes or activities that would have been commensurate with the obvious ability of the husband to pay. It appears, however, that this rather conservative attitude was, throughout the marriage, formed and accepted as much by the wife and children as by the father and was in no way related to any niggardly or penny-pinching attitude of the father.

This Court thinks it is significant that this husband and wife were able to live together in apparent peace and

harmony for more than twenty years with each partner accepting without complaint the fact that the husband devoted twelve to eighteen hours per day exclusively to his business interests; each apparently accepting a very minimum of activities as a family group; and each accepting less involvement in social, civic, cultural or other types of similar activities to which at least their financial success and worth would have entitled them. There is very little, if any, hint in this record which indicates that this wife was dissatisfied with the life which the parties led until the month of July or August, 1966, prior to the separation which occurred the following December. It may or may not be significant, but the record indicates that in December, 1964, the wife was confined for a relatively short period of time in a hospital in Murray, Kentucky, for what is generally referred to as a nervous breakdown. Shortly thereafter, and in January, 1965, upon the advice and referral of her physician in Murray, the wife was confined in Our Lady of Peace Hospital in Louisville, Kentucky, where she received extensive psychiatric treatment for what she says was "deep depression." The record indicates that she remained in that hospital until some time in March, 1965, but was then discharged in an apparently much improved condition, and there is no indication in the record that she has been required to receive care or treatment for this or any similar type of illness since the date of her discharge from the Louisville hospital. The Court has searched the record without success to find some claim on the part of the wife or some substantiation by the medical people who treated her for this illness that lack of attention, attitude, pressures or other unpleasant factors associated with the marriage were or could have been the cause of the illness, but no such claim is even made. The point which the Court is attempting to make is that this record does not disclose any serious marital discord between Mr. and Mrs. Reed or their children except for a

period of about six (6) months prior to their separation in December, 1966.

The record indicates that during the years 1965, 1966 and 1967, the husband experienced very serious difficulties with the Federal Internal Revenue Service concerning certain claimed tax liabilities of the corporations through which he conducted his businesses. The husband and his accountants who were familiar with the situation have testified that these difficulties were of such magnitude that it appeared in the year 1966 the deficiencies levied against the businesses by the government were such as to present a good probability that the businesses would be forced to liquidation in order to satisfy the tax liability. These tax proceedings in the U. S. Tax Court and elsewhere continued without interruption throughout the year 1965 and up until September, 1966, at which time the federal deficiencies and taxes for the year 1964, 1965 and a part of 1966 were settled for slightly over one million dollars. Mr. Reed testifies that this worry and concern over the tax liability, when added to the usual and ordinary requirements on the time required to be devoted to operating his businesses, did, in fact, cause him to seek the solitude of his own company without interference or interruption at his place of business or even by the members of his family. Mr. Reed testified that he attempted, during this period of financial difficulty, to discuss these matters with his wife but that her main interest during the summer of 1966 was to make vacation plans for herself and the children. Thereafter (that is, from July, 1966, until some time after September, 1966), it appears that he would leave his office earlier than usual and go to his home, eat his evening meal, read the paper and would then insist that his wife and family permit him to sit in a room by himself. His explanation of this unusual conduct is that this was the only time and his home the only place where he could collect

his thoughts and formulate plans that were necessary to raise the money required to pay the government without forcing a liquidation of his businesses.

Turning to the testimony of the wife in support of her alleged cause for divorce, she testifies that beginning about July, 1966, she saw a noticeable change in the attitude of her husband toward her and their children—but particularly toward her. She indicates that even though she had never actively participated in any part of the husband's business and did not propose to understand the problems connected with it, she was aware of the tax difficulties being experienced; and she did know that they were not only serious insofar as the future of the businesses was concerned, but were also embarrassing to her husband because of the rather widespread newspaper publicity which had been given to them. She considered that she was mistreated and rebuffed by her husband when she attempted to inquire into these business affairs and was met with emphatic insistence that the husband be permitted to work out the problems alone. The wife testifies that this attitude on the part of the husband did not change, and because of this, she and the children left the home on December 28, 1966, and removed themselves to the home of her brother at Calvert City, Kentucky, which is still in Marshall County but some seven miles distant from the family home. She and the children continued to live in the home of her brother from that date until April, 1967, at which time this action for divorce was instituted by her.

The facts recited above are substantially undisputed by either the plaintiff or defendant. The findings set out below under this heading involve matters which are, at least in part, contradicted.

Serious complaint is made by the wife that the change in general attitude of her husband toward her during the six—or perhaps nine—months prior to the separation was

evidenced not only by an unwillingness to share with her the business problems that troubled the husband but was accompanied by an almost total rejection of her insofar as physical intercourse or contact of any kind was concerned. In the brief which has been filed on behalf of the wife, much emphasis is placed on this aspect of the difficulties that developed between the parties and is cited as reason in and of itself to justify the wife in leaving the home. The point is made that Mrs. Reed is an attractive, well groomed and personable woman, forty-two years of age, (in all of which this Court concurs and agrees) and that she ought not be required to continue a marriage under such circumstances. The problem is that the husband categorically denies that any such total abstinence existed during that period and that, so far as he was concerned, this part of their marital relationship was as normal during that period as at any other time during their marriage. Without attempting to determine which of the parties' testimony is more accurate and the necessary implications to be drawn from it; or without attempting to determine what may or may not have been normal or abnormal for these parties in their troubled situation, disparity in age and other factors that would logically bear on this relationship, the Court will pass to one other facet of the marital controversy which the Court feels is most unfortunate and which undoubtedly, although perhaps unconsciously on the part of the parties, had a substantial bearing on the breakup of this marriage.

The proof for both parties shows that for the greater part of the time the husband had been in business in Marshall County he had at least five or six office employees with whom he worked very closely. At least three of these were male employees and two were females. One of the male employees was a brother of the wife, and another of the male employees and his wife were and continue to be very close personal friends and associates of Mrs. Reed.

It appears that one of the female employees had worked in Mr. Reed's office some time in the past but had taken leave for the purpose of having a child. The record indicates that this female employee was re-employed by Mr. Reed in the early part of 1966 and was at that time assigned responsibility in some of the areas that had been handled by the unrelated male employee. Both Mr. and Mrs. Reed have testified that, beginning approximately six months prior to the separation, rumors began to be circulated implying that an illicit and immoral relationship existed between this re-employed female employee and Mr. Reed. There is no indication in the record as to how widespread such rumors were distributed, but Mrs. Reed herself testifies that they were brought to and discussed with her by the male employee and his wife as well another friend and his wife who had a small business venture with Mr. Reed and with whom Mr. Reed had had some sort of business difficulty. There can be no doubt from a reading of this record that these vicious rumors, completely unfounded so far as the record discloses, left deep and scarring marks on the attitude of this husband and wife toward each other. The problem was even more aggravated when Mr. Reed insisted that the social contact between him and his wife and these outside parties be terminated. Obviously, Mrs. Reed felt differently since she testified that she has continued since the separation and for two years afterwards to maintain her close personal and social friendship with these people. Needless to say, all of this culminated in the discharge of the male employee and resignation of the plaintiff's brother and one other female employee. The significant point about this aspect of the testimony is that no effort is made by the wife to prove the truth of such rumors; the plaintiff herself makes no claim and takes no position to indicate that she even so much as believed the rumors; and the plaintiff insists that the rumors, whether true or false, had nothing to do with

her leaving the home. If such was, in fact, the true attitude of the wife, there is little in the record to indicate that any great effort was made on her part to convince the husband that she was unwilling to accept or believe these rumors which were being brought to her by those who proposed to be her best friends.

In summary then, it is the wife's position that the attitude and conduct of the husband *in the home* for six months prior to the separation in December, 1966, constituted cruel and inhuman treatment of her, justifying her leaving the home at that time. Taking the wife's testimony at its best, this conduct on the part of the husband consisted mainly of coming home earlier than usual from work, eating his evening meal, reading the paper, sitting in a darkened room by himself, refusing to discuss his business affairs with the wife, and insisting that he not be disturbed, either by his wife or by his children. There is, of course, the further complaint of physical rejection during this period of time, but this Court has no way of knowing whether this is or is not true since it is categorically denied by the husband.

The Court is now faced with finding the proper answer to the question of what type of attitude is one in this husband's position entitled to assume when faced with the responsibility of carrying on a business which requires twelve to eighteen hours of his time each day to the government for assessed tax delinquencies or, in the alternative, to see a business liquidated that he has built up over twenty-five years of constant work. Did this conduct on the part of the husband, at least during this limited period of time, justify the wife in seeking the separate confidence and companionship of those who were then having difficulties with the husband rather than for her to remain in the home and at least be available to help with the problems that had arisen.

Suffice it to say that it is the opinion of this Court, and the finding is thus made, that the record in this case does not sufficiently or satisfactorily show cruel and inhuman treatment of the wife by the husband and did not justify the wife in leaving and abandoning the home on December 28, 1966, and remaining away from the home throughout a period of more than two years from that date. The Court feels it to also be significant that the record discloses one—and only one—effort between the parties to resolve their difficulties and restore this home. That effort was instituted by the husband through the *wife's* minister. Although arrangements had been made in advance to meet with Mrs. Reed and the daughter at her home at a particular time, upon arrival it was found that Mrs. Reed had friends present in the home, and the meeting was held in an automobile. The minister testified that at that meeting the wife and children were requested by Mr. Reed to return to the home; that the husband reaffirmed his love for his wife and children; and the daughter expressed a positive desire to ". . . go home . . .". Obviously, nothing came from this effort to restore the home.

In reaching this conclusion, this Court is not being naive to the extent of finding that the relationship between Mr. and Mrs. Reed was normal for the six or nine months prior to the separation. The truth of the matter is that one may doubt whether this marriage was normal in many respects for most of its duration. It is difficult to believe that a man could regularly spend twelve to eighteen hours a day, seven days a week, fifty-two weeks a year at his business without being justly accused of being neglectful of his wife and children, at least insofar as his physical presence with them is concerned. The point is that this situation existed in this marriage from its inception in 1946 until the separation in 1966. If Mrs. Reed was able to live with the situation without serious complaint for nineteen and one-half of those years, it is the feel-

ing of the Court that she ought not be permitted to rely on a simple continuation of essentially the same conditions as justification for the breakup of this marriage. This is particularly true since the period of time relied upon involved extreme difficulties for the husband in his business matters, tax liabilities, etc.

The Children. Two very fine, unusually attractive and intelligent children were born of this marriage. The older, a girl named Marilyn, was born on January 31, 1952, and was almost fifteen years of age at the time of the separation and is now seventeen years of age. The other, a boy named David, was born on August 15, 1954, and was twelve years of age at the time of the separation and is now fourteen years of age. The mother removed these children with her to the home of her brother in Calvert City, Kentucky, at the time of the separation on December 28, 1966. Both children attend North Marshall High School, and both are exceptionally capable students as reflected by the grades which they attain and the activities in which they participate at the school. Both regularly attend Sunday School and church at Calvert City. The record indicates that the mother assumed most of the responsibility for the physical, educational and religious training of these children from the time of their birth, although the record also justitfies the conclusion that there was warmth and love between the father and the children. The record reveals an almost passionate desire on the part of the father to have his son become interested in learning as much as was possible concerning the operation of the quarry business. There is evidence that prior to the separation the son did, in fact, seem to enjoy going with his father to the quarry and associating with him and with the men who worked there. The record also discloses some interest of the son in the rather extensive registered cattle business in which the father is engaged and that he had attended cattle shows and exhibits at the Kentucky State Fair and elsewhere in

connection with 4-H Club activities. It must be said, however, that the evidence is reasonably clear that the father seldom, if ever, took the time to be with or accompany his children in church, school or other activities where parents normally accompany their children; the mother assuming almost complete responsibility for the training and supervision in these activities.

There is nothing in the evidence to indicate that any hostility or disaffection existed between the father and his children up to the date of the separation on December 28, 1966; and it appears that there were times of visitation between the father and children after the date of the separation and up until the filing of the Complaint in April, 1967. There is also evidence of the older child's writing letters to her father without the mother's knowledge, plus other evidence of the daughter's meeting her father under circumstances that her mother would not learn of it. At this point, and continuing from that time until the writing of this judgment, unexplainable and unfortunate events have occurred concerning the relationship between these children and their father.

The record indicates that following the filing of the Complaint, and in May, 1967, an order was entered by this Judge's predecessor in office providing for support of the wife and children *pendente lite* and fixing periods of visitation for the father with his children on alternate weekends beginning May 27, 1967. After the present Judge came into this case, it was called to his attention by a motion heard on July 11, 1968, that the father had been effectively prevented from seeing or visiting with his children in compliance with the order of this Court, or at any other times, by an apparent attitude on the part of the children that they had no desire to visit with their father. The stated position of the mother was and is that she had and has no objections to the children's visiting with their

father, but the decision has been left *with the children* as to whether they would comply with the order of the Court. The record reveals that the present Judge used every means available to him, short of contempt proceedings, to enforce visitation rights that the father was and is clearly entitled to enjoy. Interviews with the children failed to uncover any animosity of the children toward their father or any understandable reason for their failure to visit with their father. The utter cruelty of this situation is best exemplified when the children were permitted to testify in this divorce action that, in the event their mother should die while they were still minors, they would prefer that their Uncle Merl have custody of them rather than their own father. It should be noted that the Court has no reason to question the sincerity of the efforts by the wife's attorney's in counseling with both the children and the wife to secure compliance with these rights of visitation. All efforts in this regard have been to no avail, and the truth is that this father has been deprived of all association with his children for the better part of two years while residing some seven miles distance from them.

It is the opinion of the Court that this wife can justly be criticized for permitting this indefensible attitude to grow and prosper in the minds of these children. This Court does not understand how this mother has been and is so demonstrably capable of providing for the very best interests of the children in every other facet of their training and upbringing and at the same time, without reason or excuse, permit this unfortunate situation to exist between the children and their father which could—and very well may—seriously prejudice future benefits which they have a right to expect from their father. It is not, in the opinion of the Court, a sufficient answer by the wife that she did nothing to *prevent* the children from maintaining a healthy relationship with their father; this Court is of the opinion

that she owed and owes her children more positive parental responsibility and training in this regard. To the credit of the father, it must be noted that once it was determined that visitation rights could not be enforced short of judicial compulsion, he voluntarily withdrew his request for enforcement with the explanation that he continued to love his children and would continue to be interested in their welfare.

Despite the above, it is the finding of the Court that the legal custody of these children should be vested in the mother.

The *Property*. A considerable part of the voluminous record that has been made in this case is concerned with the property that has been accumulated during the period of the marriage. A very cursory study of the record will show that the businesses of the husband have been successful beyond the scope of ordinary imagination.

The record indicates that at the time these parties were married in 1946, the wife had approximately $500.00 and the husband had a net worth of near $50,000.00. The wife had a high school education the husband a fifth grade education. From that modest beginning, through industry, foresight—and perhaps an uncanny sense of imagination and management—the net worth of the husband as of the date of the submission of this case is betweent $4,761,000.00 and $7,132,500.00; the lower figure being the net worth established by the husband's appraisal testimony; the higher being the value as fixed by the wife's appraisers.

Many hours have been consumed and much expense incurred by the attorneys and the parties working with expert and competent real estate appraisers, engineers, accountants, stock brokers and geologists in trying to arrive at the true net worth of the property accumulated by the husband during the marriage. Many hearings have been held before this Court devoted solely to these property valuation problems, and the attorneys have performed an

excellent service for the Court in providing the record with the areas of difference between the appraisals. A study of the appraisals will reveal that a large part of the difference in the total valuation is to be found in the estimated worth of Reed Crushed Stone Company with the underlying limestone lands which it either owns or controls; and whether a market data approach is proper to be used in determining its value (as contended by the husband) of if an income capitalization approach is more proper (as contended by the wife). Other substantial differences in the appraisals may be found in the disagreement between the experts as to the highest and best use of real estate owned by the husband; a lower and less valuable use being consistently found by experts testifying for the husband and a higher and more valuable use being invariably fixed by experts testifying for the wife. The Court feels that no useful purpose would be served by attempting to here detail its findings as to each item of difference which appears in the complicated and technical testimony of the appraisal witnesses and documentations made in connection therewith. Suffice it to say that in most instances where substantial differences appear, the Court is of the opinion that the appraisals and conclusions of the husband are more realistic and that the true net worth of the defendant as shown by the proof is between $4,775,000.00 and $5,000,000.00.

Having established the value of the estate accumulated as above indicated, perplexing and difficult questions must now be faced and resolved concerning the alimony entitlement of the wife and the payment or apportionment of fees and expenses to be taxed as costs considered in the light of the provisions of KRS 453.120. Additionally, but obviously less important from a money standpoint, some consideration must be given to the obligation of the husband toward the support of his infant children until such time as they reach the age of majority or until they become self supporting.

(a) *Alimony.* This Court and all of the attorneys in the case very frankly recognize that we are here 'plowing new ground' in making an award of alimony since no case precedent of our Court of Appeals is available, at least to the extent and magnitude of the marital property involved here. It is fair to say that most of the leading alimony cases from our Court of Appeals have involved situations where the husband is grossly at fault and the wife is relatively free from fault in causing the breakup of the marriage. In this case, it should be remembered that the Court has determined that no moral delinquency is charged to either party; that the wife has failed to sustain the cause for divorce set forth in her Complaint; and that it has been determined that the husband is entitled to be awarded a divorce by reason of the unjustified abandonment of him and the marital home by the wife for a period in excess of one (1) year. The rationale of textbook law invariably cites as principal factors or circumstances governing the amount to be allowed as permanent alimony the necessities of the wife and the financial ability of the husband to meet them. Such general principals offer little assistance here since the needs or necessities of the wife as established by her standard of living acquired and maintained during the marriage are not unusually demanding, and the financial ability of the husband is obviously overwhelming. The cases indicate that the Court should further consider the financial condition of the parties; the capacity of both the wife and the husband to earn money; the age, health and general physical condition of the parties; their social standing; and their conduct or misconduct, especially with references to the question of fault in causing the termination of the marriage. When all of these and other pertinent factors are considered in the light of the history of this marriage, it

is urged by the husband that this wife is entitled to nothing more than the assurance of a comfortable home in which to live and rear the children and a standard of living to which they were accustomed during the period of the marriage, this assurance to continue for so long as the wife lives or until she remarries, ever which event should occur first. The wife contends, on the other hand, that her contributions to the marriage have been such that she is entitled to receive lump sum alimony in an amount not less than one-third (1/3) of the estate accumulated during the marriage. It is the belief of this Court that the just and equitable solution to this dilemma must, in the light of the findings herein made, necessarily be at some point between both contentions. Although the Court is aware that the wife played absolutely no active part in the management activities that have resulted in the accumulation of this substantial estate, the Court is acutely aware of the overall contribution which she has made for some twenty-years in the keeping of the home, rearing of the children and making herself satisfied with social activities that were far less financially demanding than one might expect in her circumstances. Basically, it is the feeling of this Court that this wife, irrespective of the finding that she must be charged with primary fault in the breakup of the marriage, is entitled to alimony in an amount which will be amply sufficient to provide her with financial independence for as long as she can expect to live; but she is not entitled to have this amount based on any certain percentage of the wealth that has been accumulated during this marriage.

To comply with what has been stated above, the Court feels that this wife is entitled to lump sum alimony in the amount of Five Hundred Thousand ($500,-

000.00) Dollars and that she is further entitled to receive an additional Twenty-Five Thousand ($25,000.00) Dollars a year for a period of ten and one-half (10½) years, with such annual payments to begin one year from the date of this judgment and continue from year to year on the same date thereafter with the last payment being for one-half (½) of such annual sum. It is further the feeling of the Court that the amount awarded in lump sum should be payable within three (3) months following the date of entry of this judgment. It is the intent of the Court that the $500,000.00 should be received by the wife without incurrence of tax liability thereon, and that the balance of the alimony payments specified shall meet the requirements of the Internal Revenue Code as to periodic payment and shall be tax deductible by the husband and taxable to the wife. It is further the intent of the Court that the total amount represented by the deferred payments of alimony shall be payable absolutely except that in the event of the death of the wife during said period, any amounts that would have been due to be paid if she had lived shall be voided; and no amount shall be payable to her estate. Conversely, in the event of the death of the husband during said period of time, his estate shall be liable to pay to the wife in one lump sum, discounted at the rate of six (6) per ecnt per annum, any and all amounts remaining due and unpaid as of the date of the husband's death. The Court finds no logical basis at the present time to require or justify provisions to be imposed on the husband and his estate to further assure payment of the deferred alimony; but if it should appear at any time in the future, and while any part of the deferred alimony remains unpaid, that such provisions to insure payment are justified, the wife may upon application to this Court and by proper showing, secure such relief.

(b) *Assessment of Costs to be Paid by Husband.* Substantial questions are involved in the proper assessment to each party of the very considerable costs and fees which are required to be paid incident to the filing and prosecution of this action. The technical nature of the proof relating to the net worth of the properties accumulated during the marriage has required the services of the most competent, qualified and expert real estate appraisers, engineers, geologists, accountants and stock brokers available. The case has demanded a very considerable amount of time and talents of attorneys over a period of almost two years in dealing with difficult, extensive and novel questions affecting the legal rights of the parties in connection with the estate that has been accumulated KRS 453.120 provides as follows:

> "In actions for alimony and divorce, the husband shall pay the costs of each party, unless it appears in the action that the wife is in fault and has ample estate to pay the costs."

In hearings before the Court on the matter of costs, both as to amounts and the proper parties against whom they should be assessed, it appears that the attorneys who have represented the wife feel that a reasonable fee for services rendered by them in the litigation should be fixed at an amount equal to two (2) per cent of the net estate accumulated by the parties during the marriage or a minimum of $100,000.00. They have supplied the record with a statement of their time and out-of-office expenses incurred in representing the interest of the wife. It is the belief of the Court, based upon his personal knowledge of the time and efforts expended by the wife's attorneys, that a total gross fee of not less than $60,000.00, plus reimbursement of their out-of-office expenses, is reasonable and justified. The

record has also been supplied with statements of appraiser Waldrop in the amount of $9,400.00 and accountant Nale in the amount of $1,200.00 representing billings made by them for services rendered to the wife in appraising and evaluating the net worth of the properties accumulated by the parties during the marriage. Attorneys for the wife contend, of course, that the provisions of KRS 453.120 cited above justify the assessment of all of the costs, including attorney's fees, against the husband. Since, in view of the findings made herein, the wife is determined to have been primarily at fault, the question then is whether her estate, as presently exists or as immediately created by the terms of this judgment, is "ample" to pay her proportionate part of the costs of this action. Inasmuch as all property which the wife now has in her individual name (consisting of approximately $110,000.00) is clearly subject to restoration under the provisions of KRS 403.065, it then becomes a matter of whether the lump sum alimony payment of one-half million dollars creates in the wife a sufficient estate for her to pay all or any portion of these costs. Except for the circumstances mentioned below, this Court would answer that question in the affirmative.

The Court cannot overlook the fact that a very considerable part of the time and expense of attorneys, appraisers and accountants employed by the wife was required in order to discover what they considered to be the worth of the properties accumulated during the marriage. The record will show that prior to the employment of these appraisers, accountants, etc. by the wife, a motion was made on behalf of the wife that defendant furnish the record with a statement of his true net worth. This motion of the wife was sustained. In compliance therewith, and on June 21, 1967, the hus-

band filed what purported to be a correct statement of his net worth, this statement showing a total worth of $3,782,200.38. At a later time by the husband's own admission, and after employment of appraisers, accountants, etc. by the wife, this figure was increased by the husband's own proof to approximately $4,750,000.00. The Court believes there is merit in the wife's contention that it was necessary that at least a part of her costs were incurred because of the obviously and admittedly inaccurate statement of net worth originally placed in the record by the husband. The Court is of the opinion, therefore, that it would be fair and equitable to apportion the fees earned by the wife's attorneys, the appraisal fee of Waldrop and the accountant's fee of Nale to the extent that one-third (1/3) of these fees should be paid by the husband and two-thirds (2/3) by the wife. All of the other ordinary costs of the action should be paid by the husband.

(c) *Support for the Children.* There is every indication in the record, substantiated by personal observations made by the Court during the numerous hearings that have been held, that the husband and father of the two children born of this marriage has every desire to amply provide for the requirements of his children for so long as the children either desire or need his financial support. Such being the belief and opinion of this Court, no specific amount of money will be ordered in this judgment for the support of the children except that such amounts as are paid by the father will be reasonable and sufficient to meet the needs of the children. Obviously, the future needs of these children will be provided for. This Court will be reluctant however, to order or adjudge generous support from this father for so long as the present relationship between the children and their father exists, which

strained relationship is not the fault of the father. If difficulty should arise in the future concerning the maintenance and support of the children, application may be made to this Court by the wife, and specific amounts will be ordered for their support.

(d) *Restoration of Property.* The record indicates that throughout the marriage title to various properties—real and personal—has been taken in the joint names of both the husband and wife. This property is specifically identified in an exhibit to the husband's deposition and is there valued at $110,455.67.

It is evident from the record and admitted by the wife that all of this property—real and personal—whether held in the wife's individual name or jointly with the husband, has been obtained from the husband in consideration or by reason of the marriage. Under the provisions of KRS 403.065, all of said property is, therefore, subject to be restored to the husband. As a practical matter, it may be more expedient to permit the wife to retain the money and personal property which is now held in her individual name; but if the same is retained, it shall be credited against the lump sum award of alimony which is provided for in this judgment. In those instances where title to real estate has been taken in the individual name of the wife, or jointly with the husband, such property shall be reconveyed by the wife to the husband.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and of the subject matter of the action.

2. Defendant is entitled to an absolute divorce from the plaintiff under the provisions of KRS 403.020(2)(a) for unjustified abandonment of defendant by plaintiff for a period of more than one (1) year.

3. Each party is entitled to restoration by the other of any and all properties which either may have obtained, directly or indirectly, from or through the other during marriage, in consideration or by reason thereof.

JUDGMENT

It is, therefore, Ordered, Decreed, and Adjudged by the Court:

1. That the defendant, Clyde W. Reed, be and he is hereby divorced absolutely from the plaintiff, Jean Moore Reed, and each party is hereby restored to all of the rights and privileges of an unmarried person.

2. That each party shall restore to the other such property as either may have obtained, directly or indirectly, from or through the other during marriage, in consideration or by reason thereof.

3. Custody of the two infant children born of this marriage viz: Marilyn Reed, whose present age is seventeen, and David Reed, whose present age is fourteen, is hereby awarded and entrusted to the plaintiff, Jean Moore Reed. The defendant, Clyde W. Reed, shall contribute a reasonable amount for the support and maintenance of said infant children until each shall attain the age of twenty-one years or until they marry or become self-supporting, ever which event should occur first. The defendant shall further be entitled to reasonable rights of visitation with said children.

4. The plaintiff, Jean Moore Reed, is hereby awarded lump sum alimony in the amount of Five Hundred Thousand ($500,000.00) Dollars, said amount to be received by her tax free and is to be paid by defendant within a period of three (3) months following the date and entry of this judgment. The defendant may, if he so desires, permit the wife to retain that money and personal property presently held in her individual name, but subject to restoration as mentioned above herein, in which case defendant

shall credit the lump sum award of alimony with said amount. Additionally, defendant shall pay to the plaintiff the sum of Twenty-Five Thousand ($25,000.00) Dollars a year for a period of ten and one-half (10½) years, each annual payment to be made in a lump sum, the first of which shall begin one (1) year from the date of this judgment and continue from year to year on the same annual date thereafter with the last payment being for one-half (½) of such annual sum. The amounts represented by the deferred payments of alimony shall be payable absolutely except that in the event of the death of the wife during said period of time, any amounts that would have been due to be paid if she had lived shall be voided, and no amount shall be payable to her estate. In the event of the death of the husband during said ten and one-half year period of time, his estate shall be liable to pay to the wife in one lump sum, discounted at the rate of six (6) per cent per annum, any and all amounts remaining due and unpaid as of the date of the husband's death. It is the intent of the Court that these deferred payments of alimony shall qualify under the Internal Revenue Laws to be tax deductible to the husband and taxable to the wife.

5. The plaintiff is entitled to have an apportionment of certain fees and costs which have been incurred by reason of services rendered to her in this action by attorneys, appraisers and accountants for the reasons set forth above. The defendant shall, therefore, pay all of the ordinary costs of this action and, in addition, shall pay $20,000.00 of the fees and expenses payable to the attorneys for the wife, with the wife to be responsible to pay from her own funds the balance of said fees and costs incurred for the services of her attorneys; and the defendant shall be further liable to pay one-third (⅓) of the costs incurred by appraiser Waldrop and accountant Nale as per statements rendered and made a part of the record.

Approved, signed and entered of record on this 7th day of February, 1969.

(s) James M. Lassiter, Judge,
Marshall Circuit Court

State of Kentucky }
County of Marshall } SCT

I, Martha N. Holland, Clerk of the Marshall Circuit Court, do hereby certify that the foregoing is a true, correct and compared copy of a Judgment of Divorce of record in my office in Civil Order Book No. .... at Page No. ..

Witness my hand as Clerk of the Mashall Circuit Court on this ... day of February, 1969.

Martha N. Holland, Clerk,
Marshall Circuit Court

APPENDIX B

COURT OF APPEALS OF KENTUCKY

RENDERED: DECEMBER 12, 1969

CLYDE W. REED - - - - - - - - *Appellant*

v.

JEAN MOORE REED (L. M. Tipton Reed and William E. Scent, Her Attorneys) - - *Appellees*

AS MODIFIED ON DENIAL OF REHEARING—June 26, 1970.

• • • • • • • •

Raymond B. Dycus, Smithland, Clifford E. Smith, Clifford E. Smith, Jr., E. Gaines Davis, Jr., Smith, Reed, Yessin & Davis, Frankfort, for appellant.

L. M. Tipton Reed, Neely & Reed, Mayfield, William E. Scent, Reed, Scent & Reed, Paducah, for appellee.

STEINFELD, Judge.

This is a contest over an alimony award, disallowance of a part of fees and litigation expense, maintenance for children and matters related to the foregoing. The husband has appealed and the wife has attempted to cross-appeal. We affirm the judgment in part, reverse it in part and sustain the motion to dismiss the cross-appeal.

Only three contentions and questions are submitted to this court. They are as follows:

"I. Jean Reed is Entitled to No More Than Maintenance and Support From Clyde Reed.

II. Jean Should Pay Her Attorneys and Expert Witnesses.

III. A Father's Obligation to Support His Child Does Not Extend Beyond the Age of Eighteen."

"STATEMENT OF QUESTIONS PRESENTED

1. Is a wife who wrongfully abandons her husband of twenty years, takes their children away from him and refuses to make them obey the orders of the Court, entitled to anything more from him than adequate maintenance and support for life or until she remarries?

2. Is such a wife with a separate estate in excess of $110,000 (all but $500 of which was acquired by reason of the marriage) entitled to require her abandoned husband to contribute $20,000 toward her attorneys' fees, pay one-third of her expert witnesses' fees and all of the Court costs?

3. Does a father have any legal obligation to support his children after they become 18 years of age?"

When Clyde and Jean were married Clyde's property was worth $50,000 and Jean's $500. The chancellor opined "From that modest beginning, through industry, foresight —and perhaps an uncanny sense of imagination and management—the net worth of the husband as of the date of submission of this case is between $4,761,000 and $7,132,500; the lower figure being the net worth established by the husband's appraisal testimony; the higher figure being the value fixed by the wife's appraisers." Through property given to Jean by Clyde her estate then was approximately $110,000.

Their daughter, Marilyn, was born January 31, 1953, and their son, David, on August 15, 1954. Clyde devoted almost all of his waking hours to his businesses and Jean

looked after the home and raised the children admirably. They lived frugally. This routine continued from the time of the marriage until some time in 1966 when Jean and the children left the home and shortly thereafter Jean sued for divorce.

In 1964 the Internal Revenue Service asserted a claim for additional income taxes which eventually resulted in a settlement whereby Clyde and his corporations paid approximately $1,000,000 to the federal and state governments. Depressed by worry over raising the funds to meet the income tax demands Clyde secluded himself almost nightly during 1965 and 1966 from Jean and the children. He retired to a darkened room and remained there from the conclusion of the evening meal until bedtime. During that period rumors were brought to Jean that Clyde was having an "affair" with an office employee. These rumors were never substantiated with proof to Jean and the court said they were "* * * completely unfounded so far as the record discloses * * *." In December 1964 Jean suffered a nervous breakdown, spent considerable time in hospitals and after her release in March 1965 moved from their home and later sought the divorce on the ground of cruel and inhuman treatement. KRS 403.020(3)(b). Before the decree was granted Clyde tried unsuccessfully to reestablish the marriage. Clyde denied the allegations and counterclaimed on the basis that she was guilty of cruelty (KRS 403.020(4)(d) but later he amended and charged that she had abandoned him and that the abandonment had continued for more than one year. KRS 403.020(2)(a). There was litigation over the property, alimony, and maintenance for the children, but on Jean's claim for their custody, Clyde did not resist.

The lower court adjudged that Clyde, rather than Jean, be granted the divorce on the abandonment charge but gave her the children. It awarded to Jean lump sum ali-

mony in the amount of $500,000, credited by her present estate, giving her a net of approximately $390,000. Additionally, it ordered Clyde to pay periodic alimony at the rate of $25,000.00 per year for 10½ years, but made provisions with respect to the death of either of the parties during those years. It also held that he should pay to his wife's attorneys $20,000 on account of their $60,000 fee, one-third of the cost of appraiser Waldrop whose total charge was $9,400 and the same proportion of the $1,200 charge of accountant Nale. Waldrop and Nale were engaged by Jean to assist in presenting her evidence. The court directed that Clyde pay all of the court costs of the action.

[1] Although he insists that he is being required to pay far more than he should, the appellant approves the statement made by the chancellor that Jean is "* * * entitled to alimony in an amount that will be amply sufficient to provide her with financial independence for as long as she can expect to live; but she is not entitled to have this amount based on any certain percentage of the wealth that has been accumulated during this marriage." He contends that she should not have been given a lump sum award although he offered to set up a trust which would provide her an income of $1,000 per month for her remaining unmarried life. Upon her remarriage or death the children would receive the income and corpus of the trust. Also he offered to buy or build her a home and furnish it at a total cost not exceeding $35,000. He also offered to support and educate the children. Clyde notes that the uncontradicted evidence shows that for the five years immediately preceding the separation the expenses for the maintenance of the home and all other normal living expenses averaged less than $1,000 per month. He considers it significant that the court found $625 per month alimony pendente lite as reasonable and that it is paradoxical for the court to make such a general award at the conclusion of the litigation.

He attacks both the amount of the lump sum award and of the annual allowance.[1]

[2] Appellant takes issue with the finding of the chancellor as to the value of his estate contending that it is worth not more than $3,782,000. He says that even if it be worth $5,000,000 there is nothing shown to justify an allowance based upon the size of the estate. We find sufficient evidence to support the conclusion of the court as to value, but even if the correct amount was $3,782,000 the amount of the allowance would be justified.

[3] Appellant's counsel concede that other cases offer little guidance, but they call our attention to Chastain v. Chastain, Ky., 405 S. W. 2d 758 (1966). However, there it was found, as here, that the wife was at fault but alimony was allowed to her in the absence of proof of immorality. No claim has been made of immorality on the part of Jean. They note that the experience of the wife in investing funds and taking care of financial matters was a factor properly considered in Holder v. Holder, Ky., 424 S. W. 2d 600 (1968), and say that Jean has had no experience in investing money. Clyde is quite concerned that the allowance to Jean of a substantial lump sum is putting her in possession of wealth with which she is incapable of dealing. Lump sum alimony awards are favored by this court. Broida v. Broida, Ky., 388 S. W. 2d 617 (1965).

[4] KRS 403.060(1) authorizes an award of alimony to the wife if she has insufficient estate of her own, and she obtains a divorce. Coleman v. Coleman, 164 Ky. 709, 176 S. W. 186 (1915). "It is well established by judicial interpretation that a needy wife may receive alimony on a divorce granted to the husband where she is not entirely to blame for breaking up the marriage and is free from moral

[1]On petition for rehearing appellant for the first time contended that the court was powerless to award Jean any alimony in excess of that which Clyde had offered. KRS 403.060. We reject it. RCA 1.350(b). Herrick v. Wills, Ky., 333 S. W. 2d 275 (1959); Stewart v. Jackson, Ky., 351 S. W. 2d 53 (1961), and Com., Dept. of Highways v. Thomas, Ky., 427 S. W. 2d 213 (1967).

delinquency." 54 Ky. Law Journal 222. Many of our decisions are cited in support of this statement. Clyde does not rely on the denial of the divorce to the wife. We interpret that statute to mean that "* * * the wife's estate must be of such character and amount as will yield income or profits sufficient for her comfortable maintenance in a style suitable to her social standing, without her being required to consume the principal." Scott v. Scott, Ky., 433 S. W. 2d 631 (1968). Clyde says that Jean was guilty of misconduct in breaking up the home and that Scott stands for the proposition that she should not profit by her misconduct. Also argument is made that Jean's $110,000 estate would produce in excess of $550 per month and that it would take only another $5,400 annually to provide her $1,000 per month, the amount on which the entire family had lived. One answer is that while the trial court found that she was at fault, which finding we do not disturb, nevertheless, it appears to us that he sacrificed his marriage to his business. The habits of Clyde in substantially ignoring his family were compelling influences on her actions. Cf. Cawood v. Cawood, Ky., 329 S. W. 2d 567 (1959).

Although Jean worked little in the various business ventures she ran the home at such a minimum expense, commensurate with the family income and wealth, that we cannot say she did not assist in creating that wealth. In speaking of restoration of property we said in Cooke v. Cooke, Ky., 449 S. W. 2d 216 (1969), that where "* * * property has been accumulated in the course and by virtue of the joint efforts of husband and wife as a marital unit, one carrying out his responsibilities, and the other carrying out hers. * * * upon dissolution of the marriage, the trial court should be free to weigh it up and determine when, whether and how it is to be cut off and separated out." Here it appears that the same reasoning should apply. The chancellor permitted Jean to retain the property valued at $110,000 which she received by reason of the

marriage although she was required to credit it on the lump sum award. The $500,000 award together with the annual installments does not appear to be an abuse of discretion, therefore, it will not be disturbed. Long v. Long, Ky., 416 S. W. 2d 353 (1967); Justice v. Justice, Ky., 421 S. W. 2d 868 (1967) and Lyen v. Lyen, Ky., 422 S. W. 2d 127 (1967).

[5] Appellant complains bitterly that "the real cost" to him of the lump sum award will greatly exceed $500,000 because he was ordered to pay the balance within 90 days of the judgment date. The proof showed that raising "immediate cash" of sufficient amount would be difficult and costly. Sales at sacrifices would be necessary and the tax impact would be huge. In Broida v. Broida, Ky., 388 S. W. 2d 617 (1965), we held that the tax impact should be considered. There was fashioned a plan for payment to avoid unnecessary burden—we do so here.

The judgment should be amended to provide that one-fourth of the balance (approximately $390,000) of the lump sum award was due and payable on May 7, 1969, one-fourth of that balance on or before February 7, 1970; one-fourth on or before February 7, 1971, and the remainder of the lump sum award on or before February 7, 1972. The unpaid balance of that award shall bear interest at the rate of 4% per annum from February 7, 1969 (the judgment date), until the due date of each installment, and 6% thereafter, with the accrued interest on the remaining balance being due and payable when each installment is due.

Payment of the amount of the lump sum award should be secured by pledge, lien or other adequate protection in such manner as shall be determined by the chancellor. Default in making any payment in full when due or in providing required security shall authorize Jean to precipitate the balance and enforce immediate payment thereof.

[6] Clyde attacks the judgment because it requires him to "* * * contribute a reasonable amount for the support

and maintenance of (his) children until each shall attain the age of twenty-one years or until they marry or become self-supporting, ever which event should first occur." The court did not fix a specific amount. In Young v. Young, Ky., 413 S. W. 2d 887 (1967), we held that in view of the enactment of KRS 2.015 fixing the age of majority at 18 the court was without right to require the husband to maintain his children after their 18th birthday unless they became physically or mentally incapable of supporting themselves. Also see Blackard v. Blackard, Ky., 426 S. W. 2d 471 (1968). The portion of the judgment which specifies that support shall be provided after age 18 was erroneous.

[7] The trial court found "* * * that a total gross fee of not less than $60,000 plus reimbursement of their out-of-office expenses, is reasonable and justified" as compensation for the services rendered to Jean by her attorneys and adjudged that Clyde should pay one-third of that fee and expenses. He objects and argues that both KRS 403.060 and KRS 453.120 have been interpreted as being subject to the general limitation that the wife's separate estate be insufficient for her to defray the expense of the litigation. While KRS 453.120 does not specifically state that the husband shall defray the expense of the attorneys for the wife we have so construed it. Wills v. Wills, 168 Ky. 35, 181 S. W. 619 (1916), and Anderson v. Anderson, 310 Ky. 521, 221 S. W. 2d 69 (1949). It provides: "In actions for alimony and divorce, the husband shall pay the costs of each party, unless it appears in the action that the wife is in fault and has ample estate to pay the costs." Clyde contends that Jean's estate is ample to pay her attorneys. He has made those attorneys parties to this proceeding so that this matter could be litigated. Jones v. Jones, Ky., 412 S. W. 2d 868 (1967), and Smith v. Smith, Ky., 424 S. W. 2d 573 (1968). Jean had no estate except that given her by Clyde, the amount of which was credited on the alimony award. It was not error to hold that the attorneys must

be paid in part by Clyde. Cf. Robb v. Robb, 281 Ky. 729, 137 S. W. 2d 385 (1940).

[8] Clyde argues that there is no justification for a fee of $60,000 to Jean's attorneys regardless of Clyde's or Jean's ability to pay.[2] He relies upon the minimum fee schedule of the Kentucky State Bar Association and claims that a fee based upon that schedule would be reasonable. He overlooks the fact that this is a "minimum fee schedule," and serves only to advise the court. Many factors enter into a determination of the proper amount. King v. King, 218 Ky. 9, 290 S. W. 725 (1927); Stubblefield v. Stubblefield, Ky., 327 S. W. 2d 24 (1959) and 27A C.J.S., Divorce, § 224 c, p. 987. In the brief filed here counsel carefully analyzed the number of hours spent and the type of litigation, all of which we and the trial court considered and we are unable to say that the amount fixed was clearly or at all erroneous. Cf. Broida v. Broida, Ky., 388 S. W. 2d 617 (1965) and Hopkins v. Hopkins, Ky., 431 S. W. 2d 863 (1968).

Clyde objects to being charged with one-third of the compensation and expenses claimed by an appraiser and an accountant employed by the wife. It appears to us that the services of those two experts were necessary and our holding with respect to the requirement that the husband pay one-third of the attorney's fee is equally applicable to the decision concerning the payment of the charge for these experts. Walters v. Walters, Ky., 419 S. W. 2d 750 (1967) and Justice v. Justice, Ky., 421 S. W. 2d 868 (1967).

We must now determine whether we may consider the contentions made by Jean on her attempted cross-appeal. She says that she is entitled to alimony approximating one-third of Clyde's estate; that it was error to require her to pay any part of her attorneys' fees or expenses for expert witnesses; and that she is entitled to a lien to secure the

[2]Clyde does not argue that the court is powerless to require a husband to defray part of a wife's expenses for attorneys, appraiser or accountant.

deferred alimony payments. She also claims that she was improperly denied certain discovery opportunities and that the court erroneously considered irrelevant factors in determining the amount of the alimony award. In connection with these arguments we are referred to many cases and texts.

[9] On May 12, 1969, appellant filed a statement of appeal (RCA 1.090), paid the tax (KRS 142.011(1)), gave bond (CR 73.05) and deposited the record with the clerk. The appeal was docketed and forthwith a notice was mailed to all attorneys of record. RCA 1.070(b). Even though counsel for Jean had filed notice of cross-appeal on April 22, 1969, as provided by CR 73.02 and CR 74, they took no procedural steps to perfect the cross-appeal until September 9, 1969, when there was delivered to the clerk of the Court of Appeals a statement of cross-appeal, a check for $50 as a cash bond and a motion for leave to file a tendered bond. CR 73.06(2). Two days later appellant moved to dismiss the cross-appeal on the ground that it was not perfected within the time permitted by RCA 1.080.

That rule, after its amendment which was effective May 1, 1968, provides:

> "To perfect a cross-appeal, the party taking a cross-appeal shall, within 20 days after the mailing of the notice provided in RCA 1.070(b), (1) pay the tax required by KRS 142.011(1), (2) file a statement of cross-appeal setting forth (a) the name of each cross-appellant and each cross-appellee, (b) the name and address of counsel for each cross-appellant and each cross-appellee, and (c) the date the notice of cross-appeal was filed and the page of the record on appeal on which it may be found, and (3) file the bond on appeal required by CR 73.05."

Clyde cites United Mine Workers of America v. Morris, Ky., 307 S. W. 2d 763 (1957), in which an appeal was dis-

missed for failure to file a statement of appeal. We said that "Judicial administration is dependent upon procedural rules. Without a definitive method of procedure a court cannot function effectively, nor would citizens have the equal protection of the law." We made it clear that the timely filing of the statement of appeal was "* * * not a formality, but is required because it furnishes this Court necessary information with respect to the parties to the appeal, the judgment appealed from, and other items of importance." Stating that "Such rules have the force of law," we refused to relax the rule and adjudged that the attempted appeal should be dismissed. The rationale of that ruling applies with equal force to the 20-day time limit fixed by RCA 1.080.

Appellee concedes that almost four months had passed before she made effort to perfect the cross-appeal. In the meanwhile, the appellant had moved the Court of Appeals to be permitted to practice the appeal on the original record which motion was sustained, the appellees had filed a "designation of record on cross-appeal" (CR 75.01), the appellees had filed a response to appellant's motion to practice the appeal on the original record and requested that if the court sustained the motion the cross-appellee be given the same permission. Further, the appellant moved to advance the case which motion was sustained, the appellant filed its brief and a reply brief to the appellees' brief which she had filed. The case was submitted on August 1, 1969. The court did not rule on the appellee's motion that she be permitted to practice the cross-appeal on the original record.

[10] In support of her argument that the cross-appeal should not be dismissed, Jean claims, without merit, that she was not required to comply with RCA 1.080 until the court had ruled on the motion to prosecute her cross-appeal on the original record. There is nothing in RCA 1.080 which provides for an extension of the time fixed by that

rule. Furthermore, the court could not be expected to pass upon the motion until the cross-appeal had been perfected.

[11] Secondly, the appellee contends that Clyde waived his objection to appellee's late perfection of her cross-appeal. Her counsel cite Bardill v. Bird Well Surveys, Inc., Ky., 310 S. W. 2d 265 (1958), in which a motion to dismiss by reason of appellant's late filing of the record on appeal was the issue. We said that "The filing of the record on appeal is not a jurisdictional matter, and non-compliance with the time limits of CR 73.08 may be excused under special circumstances." She also refers to Elam v. Acme Well Drilling Co., Ky., 411 S. W. 2d 468 (1967), in which the appellant had failed to designate the record for more than 100 days after the day the notice of appeal was filed. The appellees had failed to seasonably move for dismissal, which we said was a waiver of the right to make that demand. In the case now before us counsel for Clyde moved to dismiss the appeal almost immediately after the appellees had served their motion for leave to file the cost bond which they say was their first notice that RCA 1.080 had not been complied with.

The cross-appeal must be and it is dismissed even though this may seem harsh. Gulf Oil Corporation v. Vance, Ky., 431 S. W. 2d 864 (1968). The issues raised thereby, except those discussed in connection with the original appeal, will not be considered. The judgment is affirmed in part and is reversed to the extent indicated herein and the trial court is directed to correct and amend the judgment to conform to this opinion. The cross-appeal is dismissed.

All concur, except Osborne and Neikirk, JJ., who dissent.

Palmore, Judge (concurring).

The dissenting opinion in this case contains a valuable historical analysis of the development of the current state

of the law in this jurisdiction relating to the increasingly difficult problems of divorce, alimony and property division, However, the principal issue discussed in the dissent was not really presented at the trial level and was certainly not urged on this appeal.

While we appear to stand alone in our approach to statutory construction in this field, the same authority which notes this variance also admits that our decisions have generally achieved acceptable results. Despite the literalism of the particular statute, the legislature had also deliberately vested jurisdiction in matters of divorce and alimony in equity courts for a long time. That the powers of equity have always been adapted to meet social problems and changes as they arise is an established tradition which cannot be regarded as completely unknown to the legislative branch.

Nevertheless, the dissent ably illustrates a real need for a restatement of the law in this jurisdiction. In my view that restatement should consist more of clarification and recasting of language than in any radical change of governing principles.

In the instant case, the appellant has argued that he is willing to pay substantial amounts for the support of appellee—the only issue is how much. An able and conscientious trial judge carefully and meticulously undertook to effect what he conceived to be a fair and equitable result under existing law. No abuse of discretion on his part is shown in this aspect of the case.

Recognizing the need of clarification and reconciliation of apparently conflicting statements in our opinions in this delicate area, I am nevertheless convinced that in this case the trial judge acted properly within the framework of existing law. I do not believe the result would be different under the restatement of law that I am persuaded is necessary.

I am authorized to state that Judge Reed (no relation to the parties to this action) concurs in the views which I have stated.

We therefore concur in the majority opinion and in the results directed therein.

Osborne, Judge (dissenting).

Our present statute with regard to what a wife should receive from her husband after a divorce is KRS 403.060. it provides:

"(1) If the wife does not have sufficient estate of her own she may, on a divorce obtained by her, have such allowance out of that of her husband as the court considers equitable; but no such allowance shall divest the husband of the fee simple title to real estate.

"(2) Upon final judgment of divorce from the bonds of matrimony, each party shall be restored all the property, not disposed of at the beginning of the action that he or she obtained from or through the other before or during the marriage and in consideration of the marriage."

"(3) Pending an action for divorce or for divorce from bed and board, the court may allow the wife maintenance."

This statute is the basis for any property settlement or alimony granted after a divorce. To trace the evolution of this statute one must go back to two statutes, one enacted in 1800, the other in 1809. The 1800 statute was an act concerning alimony. It can be found in 2 Litt. 409. It provided that the court could grant a wife alimony if she proved that her husband had abandoned her for one year, lived in open adultery for six months, or had been guilty of cruel, inhuman and barbarous treatment. After such a decree, the wife could live apart from her husband and could use the

alimony or any property afterwards acquired by her as if a femme sole. This statute apparently set up a statutory scheme for divorce a mensa et thoro similar to that granted by the ecclesiastical court of England. Such decree did not end the marriage, it merely freed the wife to live apart from her husband. Since at common law the wife could have no property of her own, all property which she owned prior to the marriage became her husband's. This also applied to any property acquired after marriage. A wife apart from her husband was necessarily destitute. For these reasons, the ecclesiastical courts made provisions for the wife in this situation. Such a provision was in the form of alimony, or a periodic sum for support. Madden, Domestic Relations (1931). This apparently was what this statute was intended to provide. Subsequently, the Court of Appeals of Kentucky decided that the courts of the Commonwealth could grant alimony in such a situation without statutory authority, the jurisdiction of the English ecclesiastical courts in this regard having evolved upon the courts of equity. Butler v. Butler, 4 Litt. (14 Ky.) 201 (1823).[1]

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[1]There seems to be some confusion in our case law to the effect that the right to grant alimony existed under the common law. Nothing could be further from the truth. The ecclesiastical courts made such awards in granting decrees a mensa et thoro, but no such power ever existed in the chancery courts and without statutory authority never existed where divorce a vinculo matromonii was granted.

In the Butler opinion, Judges Miles discusses this problem, as follows:

> "On this question, elementary writers place the power of decreeing alimony, in general terms, among the powers of the chancellor. But when the adjudged cases are examined, it is found that generally some peculiar circumstances must exist to authorize such decree. Thus, it is said, that there must be an agreement between the parties that alimony should be allowed, or a previous sentence of an ecclesiastical court, separating the parties *a mensa et thoro*, from which an agreement would be implied, or the chancellor would not interfere; that is, he would not take the matter *ab origine*, settle the separation and grant alimony. As to decreeing a separation, it seems clear that the power was never considered in England to belong to the chan-

(Footnote continued on following page.)

The second of these early statutes is "An Act regulating Divorces in this Commonwealth" passed in 1809 and found at 4 Litt. 19. This provided for divorce a vinculo or divorce from the bonds of matrimony if the defendant spouse were guilty of certain conduct, although it refers to such simply as divorce. It provided that, "The court pronouncing the decree of divorce shall regulate and order the division of estate, real and personal, in such way as to them shall seem just and right, having due regard to each party, and the children if any * * *." Such proceeding as this had no precedent in the English practice. There being no judicial divorce a vinculo in the Common Law, such divorce could only be granted by an act of Parliament. Madden, Domestic Relations (1931). After divorce a vinculo matrimonii, the parties were apparently restored to the property they had before marriage. However, it is not clear under the Common Law that any other division of property was granted. This statute did not require a complete restoration of the wife's property. See Wilmore v. Wilmore, 15 B. Mon. (54 Ky.) 49(4), wherein, in a divorce action commenced under this Act, it was argued that the wife ought to be restored certain slaves which came to the husband through her. This statute does not speak of alimony or maintenance, and no cases can be found under it granting other than a division of the property of the parties.

In 1850 the Commonwealth adopted a new Constitution. This Constitution called for the legislature to use statute revisors to consolidate the statutes in force and report back to the General Assembly. At this time substantial changes

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cellor; but to the ecclesiastical courts. And it has been the clear understanding since the commencement of our government, in every state, so far as is known to the court, that no power of granting divorces, either *a mensa et thoro*, or *a vinculo matrimonii*, existed in any tribunal until it was granted by legislative authority and that the marriage contract without such grant, could not be annulled, either in whole or in part." Butler v. Butler, 14 Ky. 201, 4 Litt. 201, p. 203.

were made in the divorce laws of the state. The compiled statutes were enacted by the General Assembly in 1852. The 1852 enactment is substantially the same act which we have today. It provided for divorce from the bonds of matrimony and divorce from bed and board. Chapter six of the Act provided, "Upon final decree or divorce from the bonds of matrimony, the parties shall be restored such property, not disposed of at the commencement of the suit, as either obtained from or through the other before or during the marriage, in consideration or by reason thereof; and if the wife have not sufficient estate of her own, she may, on a divorce obtained by her, have such allowances out of that of her husband as shall be deemed equitable." This Act seems to speak only in terms of restoration of property and a property settlement and not to contemplate periodic alimony as such. In light of the Common Law history and the previous statutory history in this state, there seems to be little doubt but that this was the intent of the legislature. Alimony or periodic support had historically only been allowed to supplant the husband's obligation to support his wife during the marriage or after divorce a mensa et thoro, which did not end the marital relationship. Since this obligation to support did not exist after a divorce a vinculo matrimonii, it seems doubtful that the legislature intended to apply it here. For a considerable time after this piece of legislation was enacted our courts interpreted the alimony provision as referring only to a property settlement and did not interpret it as a grant of power to award alimony. This rule was first departed from in Canine v. Canine, Ky., 16 S. W. 367 (1891). In this case the court held that the wife could be granted support by way of periodic payments where the husband did not have an estate at the time of the divorce out of which a lump-sum payment could be made. When we consider the historic background of the legislative Act, it would appear that this

case added something to the law which had not previously existed and which has been with us since.

The next case decided by this court with great historical significance as far as alimony is concerned was Davis v. Davis, 86 Ky. 32, 4 S. W. 822 (1887). Even though the Act provided that the wife was entitled to alimony only upon divorce being granted to her, the court held that where the chancellor obviously abused his discretion and wrongfully granted the divorce to the husband this could not work to bar the wife from alimony even though this court had no power to reverse the divorce decree.

The next case to come before the court of historical significance was Tilton v. Tilton, 29 S. W. 290 (1895). Here the court held that where the wife is granted the divorce, alimony should follow as a matter of right, saying, "We understand the rule to be that, in an action for divorce, the right to alimony will follow, if the wife is granted the divorce." Here the court completely overlooked the fact that the right of the wife under the Act is conditioned on her lack of sufficient estate of her own.

As a result of the above three cases, it would seem that the court substantially amended the legislative Act by first adding periodic payments in lieu of a lump-sum settlement. Second, by authorizing alimony where the divorce had been granted to the husband if the chancellor was clearly erroneous in this action. Third, by authorizing alimony where the wife is granted the divorce even though she might have sufficient estate of her own. It is submitted that up to this point in our history no great damage had been done to the Act itself. Even though one would have to admit that the Davis case constituted a substantial amendment to the Act, it seems to be one that was necessary in order to prevent a manifest injustice in view of the fact that this court cannot reverse a trial court in the granting of a divorce decree.

The Canine case constituted an extension of the law if one gives strict construction to the Act, however, it can be

allowed that the Act did encompass alimony, if one views the husband's estate as including his earning power. Granted this is a result never before reached by our courts it nevertheless is not totally unreasonable.

Following the above cases, the court in a long series of decisions wherein alimony and property rights were before it seems to have been confused as to the exact nature of the award being made. The court would approve an award of a certain sum of money, and attempt to justify its action by talking in terms of the wife's dower interest or of her future need for living expenses or of the contributions which she had made toward the accumulation of her husband's estate either in the form of labor or money.

Because of confusion as to the nature of the award being made and by extending the rules originated in the Tilton, Davis and Canine cases, the court became more lax in its awards of alimony and paid less and less attention to the provisions of the Act itself. All of this culminated in 1961 in Heustis v. Heustis, Ky., 346 S. W. 2d 778. Here the husband was granted a divorce and apparently properly so, which under the Act would have barred the wife from alimony unless this court under Davis could say that the trial court abused its discretion in awarding the husband the divorce. The wife had made no contribution to the husband's estate either through work or funds which would entitle her to an equitable distribution out of it. Yet, this court awarded alimony equal to one-third of the husband's estate. In the course of the opinion, we said:

> "That a wife who makes the home, raises the children, gives succor and moral support to the husband and aids him in the saving and investment of his money, but who does not directly convert any individual effort or earnings into the form of property, in the event of divorce has no interest in the property accumulated through the husband's earnings during the marriage is

a travesty made tolerable only by the judicial power to correct it in the form of alimony.

"• • • Where the wife has fully performed her share of the responsibilities during the substantial portion of her married life with the husband and has not brought on the divorce by moral delinquency, and the husband is not entirely free of fault, we are of the opinion that alimony should be in an amount not less than one-third of the estate accumulated from the income of the husband during the marriage (as distinct from whatever portion of his estate may have been derived from independent sources), unless, of course, she has a sufficient estate of her own or unless there are other unusual circumstances rendering such a division inequitable."

The Heustis case is so completely in conflict with the statute as to make the two irreconcilable.[2]

At this point it might be well to clear up some terminology which is often loosely used by the court. There is a clear and distinct difference between an award of alimony to a wife and the award of an equitable settlement out of the husband's estate due her as a result of contributions she has made to the accumulation of the estate either through the contribution of work or personal funds. For these distinctions see 24 Am. Jur. 2, § 525, Alimony distinguished from dower or from wife's equity, p. 650-1.

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[2]For a blow-by-blow account of what happened between Davis and Heustis see the following cases. Lacey v. Lacey, 95 Ky. 110, 23 S. W. 673 (1893); Tilton v. Tilton, Ky., 29 S. W. 290 (1895); Pore v. Pore, Ky., 50 S. W. 681, 20 Ky. Law Rep. 1980 (1899); Green v. Green, 152 Ky. 486, 153 S. W. 775 (1913); Moore v. Moore, 231 Ky. 829, 22 S. W. 2d 251 (1929); Baker v. Baker, 271 Ky. 735, 113 S. W. 2d 16 (1938); Hayes v. Hayes, 275 Ky. 273 121 S. W. 2d 698 (1938); Luke v. Luke, 276 Ky. 683, 125 S. W. 2d 251 (1939); Sharp v. Sharp, 302 Ky. 426, 194 S. W. 2d 835 (1946); Coleman v. Coleman, Ky., 269 S. W. 2d 730 (1954).

"The function of alimony is merely to make provision for the support of the wife during the lifetime of the husband. After his death there is no longer any necessity for its allowance at common law for, as the ecclesiastical courts did not grant an absolute divorce for causes that supervened the marriage, but only one a mensa et thoro, the marriage relation was still preserved and as the widow she then came into the enjoyment of her dower rights. * * * "Since alimony is based upon the duty of the husband to support his wife, the funds wherewith it is to be paid must proceed from his own estate; and if he has nothing and is unable to obtain anything wherewith it may be paid, it must remain unpaid.

* * * "There is another type of 'wife's equity,' which is based on her contributions during marriage to the husband's acquisition of property, a recognition of which is in the nature of a settlement of property rights."

See also 24 Am. Jur. 2d § 928, p. 1057, Type of Property, or time and manner of acquisition:

"One spouse may have a special equitable interest in property held in the other's name, which interest may arise in many ways, and the court may award a share of the property representing such special interest in it. For instance, it is held that where a wife by her own industry and labor has contributed to the husband's acquisition of an estate, she has an equitable interest which must be recognized by a division of property. And where the wife has contributed money toward the purchase or improvement of the family home she has an equitable interest in the property measured by the amount she has spent, especially where the parties have treated her contribution as a loan to be repaid by the husband."

The Heustis case cannot be justified as an equitable distribution of the husband's estate under any known rules of law. The award had to be one for alimony and in view of the fact that our statute requires that the divorce be granted to the wife before she is entitled to alimony, it seems impossible that this result could be reached when the husband was awarded the divorce. Many different jurisdictions have in their alimony statutes the same requirements as ours requiring that before the wife is entitled to alimony she must be awarded the divorce. We alone of all jurisdictions have failed to give effect to this requirement. As a result, we have been sujected to some rather harsh observations by the compilers of the American Law Reports Annotated. See 35 A.L.R. 2d 318 wherein the general rule for all other jurisdictions is set out and then a special section added for the holdings of the Kentucky Court of Appeals:

> "In Kentucky there are nearly one hundred reported cases on the present subject, and the alimony statute provides that if the wife does not have a sufficient estate of her own, she may, on a divorce obtained by her, have such allowance out of that of her husband as shall be deemed equitable. *Clearly this statute is such as to deprive the courts of the power to award alimony to a wife against whom a divorce is granted* if the statute is construed in accord with the prevailing view in other jurisdictions; and in partial accord with that view it is variously held or stated that where the husband is properly granted a divorce because of the wife's misconduct or fault she is not entitled to permanent alimony, or that she will not be allowed alimony, that the trial court properly denied or should have denied alimony, or that where the wife's treatment of the husband was so cruel as to entitle him to a divorce it prevented her from securing alimony." (Emphasis added).

34 A.L.R. 2d 324, p. 324:

> "In Kentucky there is a remarkable series of nearly one hundred decisions which ordinarily achieve a just result, but leave one in doubt as to the basis of the holdings. In only a few cases does the court attempt to construe a statute or find a nonstatutory solution to the problem; and the court often discusses the equitableness of a particular determination on the assumption that the statutes permit or do not prevent it from reaching an equitable result. The statute in effect when most of the cases herein were decided provided that if a wife does not have a sufficient estate of her own, she may, on a divorce obtained by her, have such allowance out of that of her husband as shall be deemed equitable. *Clearly this statute is such as to deprive the court of the power to award alimony to a wife against whom a divorce is granted if it is construed in accord with the holdings* in other states which have similar provisions." (Emphasis added).

Such comments as the foregoing are somewhat embarrassing to those of us who would see the law enforced as it is written rather than to try cases on a case to case basis and pervert the law to satisfy our own peculiar sense of justice. To demonstrate how far we have actually come from the statutory authority I would point out some of the language used by this court in Carter v. Carter, Ky., 382 S. W. 2d 400 (1964), wherein we said:

> "From a strictly literal standpoint KRS 403.060 confers a right to alimony only when the wife obtains (or, of course, is entitled to) the divorce. However, divorce proceedings are equitable actions in this state (KRS 403.010), and equity is broader than the statute. Hence it is well settled that even when the husband is solely entitled to and obtains a divorce the wife may and in some cases should be awarded alimony."

This statement of the law is so obviously wrong as to be shocking, for the very simple reason that there is no Common Law right to divorce whether equitable or otherwise. The right to grant a di vorce is one that has always been and is legislative. Without KRS 403.010 there would be no right of divorce in this jurisdiction today, and this court would have no power whatsoever in the field. As the total power to permit divorce is in the legislative arm of the government it can grant or withhold it at will and, if it grants it, it can grant it with such restrictions as it sees fit. A fine example of how we are prone to misinterpret cases and to pervert the law to suit our own whim and caprice can be found between the cases of Carter v. Carter, supra, and Coleman v. Coleman, Ky., 269 S. W. 2d 730 (1954). The Carter opinion wherein we boldly state that our power is much greater than that of the legislature cites the Coleman case for authority: Yet in the Coleman case we said:

> "But this whole subject is governed by statute and it is the duty of the courts to follow the legislative enactment."

I submit that the Coleman case is no authority at all for the expressions made in the Carter case. To further point out how inconsistent he have been, compare the language of the Heustis case with the following language from Hicks v. Hicks, 290 S. W. 2d 483 (Ky. 1956):

> "The Chancellor in determining the amount and manner of the alimony to be paid is *guided by no formula* but, in his discretion, should consider the following elements with respect to each party: size of estate, income, earning capacity, age, ability to labor, health, and station in life. The *cause of the divorce* and the *relative responsibility of the parties,* as well as *whether or not the wife has assisted in the accumulation* of the property concerned, should also be considered along with any other pertinent matter."

To further point up the confusion and inconsistency just five months before the Heustis case was decided in Goetz v. Goetz, 341 S. W. 2d 249 (Ky. 1960), this court said:

> "It is apparent from our cases that the *comparative fault* of the parties is one of the *major* considerations in determining the right to and the amount of alimony. See Scalf v. Scalf, Ky., 312 S. W. 2d 467." (Emphasis added.)

Many other glaring inconsistencies can be found in our cases. To point them all out would extend this dissent beyond any bearable length. The law of this jurisdiction relative to the rights of a wife to alimony is what the legislature has enacted. Nothing more, nothing less. The fact of the matter is that within the framework of judicial discretion this court constitutionally has the power to interpret that law in order to make it serve its intended function. This court has no right, it has never had a right, to change or alter so much as one period or one comma in the legislative act. It is a weakness of our system of government that erroneous judicial decisions are enforced once they become final the same as proper ones and even though the Act says in unambiguous terms that a wife is not entitled to alimony unless she is granted the divorce, we are nevertheless free to make alimony awards when the divorce is granted to the husband and these will be enforced. However, they are not the law; they will never be the law and a thousand years from now they will prove nothing but the fact that a court in this day and age had a right to ignore the plain, simple law and decide cases out of its bounds. As far as I know it has never been questioned and will never be questioned but what the right to grant divorce is a power of the state. It can bestow it or it can withhold it. In England this was done through Parliament and not until the statute of 20 and 21 Vict. (1857,

chapter 55), entitled "An Act to Amend the Law Relating to Divorce and Matrimony Causes in England," were the courts of England given any jurisdiction at all in the field. 2 Burn. Eccl. Law 202; Macq. Parl. Pr. 470. In the early history of this Commonwealth prior to our first divorce act in 1800, divorces were granted on an individual basis by the legislature. This being true, the legislature could put such restrictions upon the subject as it saw fit. Having enacted KRS 403.060, we are bound by its terms and have no right to depart therefrom. The fact that this Act has been subjected to long judicial abuse does not make it any less the law. Russman v. Luckett, Ky., 391 S. W. 2d 694. It is the law and it will remain the law upon this subject until the legislature changes it. Ten thousand judicial opinions saying otherwise will not make it less so. Courts can't change the law with erroneous opinions. The law will always be there. And the judicial opinions will only serve as a monument to the failure of the court system. They will never become a tombstone to a dead law.

I believe this court has no choice but to uphold this statute as it is written, with this addition that where a trial court clearly abuses its discretion in awarding the divorce to the husband and such can be found from the record, without doubt, we should consent to an award of alimony under the Davis case, supra, for I feel that case represents a proper exercise of judicial authority. We should continue making an equitable distribution to the wife where she is entitled to it because of labor or funds contributed to the husband's estate, because it does not appear this in any way conflicts with the statute. We should likewise follow the Canine opinion, supra, to the extent of allowing the wife alimony out of the husband's future earnings where he has no estate of his own out of which a lump sum might be paid in instances where she has been awarded the divorce and is clearly entitled to such alimony. I believe this rule to have doubtful historical validity but I cannot say posi-

tively that the court was wrong in its adoption. In my opinion, it is now a part of our law. The decision of when a wife has sufficient estate of her own is one that will have to be made by the Chancellor on a case to case basis. Therefore, it is not possible to set down an exact rule that will work in all future cases. Unless a wife is entitled to alimony under the foregoing rules, we should deny it. This may run afoul of some people's idea of instant justice. This cannot be helped. If the people who must live under this law are not satisfied with it, their duly elected representatives will surely change it. And, when that change comes, we should move to enforce the changes just as faithfully as we enforce this Act.

In the case before us, the husband was granted the divorce because of abandonment by the wife. There seems to be no question but what this finding of the Chancellor was correct, therefore, she is not entitled to alimony. However, the husband has agreed to pay alimony in a stipulated amount. This should be approved.

Judges live and write for the moment; the law goes on forever. Judges can and do nurture, guide and enforce the law. Within the framework of construction a judge legitimately can, and oftentimes must, make a choice between two competing rules as they apply to a given set of facts. But, just as we have no right to take a blue pencil to the compiled acts of the legislature and strike therefrom those acts which do not suit our fancy, we cannot by the course of our opinions refuse to give effect to perfectly valid enactments. This is the equivalent of a veto power over legislation, which we do not have.

For the foregoing reasons, I dissent.

Nzikirk, J., joins in this dissent.

APPENDIX C

IN THE

MARSHALL CIRCUIT COURT

Civil Action File No. 2047

JEAN MOORE REED, - - - - - - *Plaintiff,*

v.

CLYDE W. REED, - - - - - - - *Defendant.*

ORDER ON MOTION AND AMENDED MOTION OF DEFENDANT TO SET ASIDE PORTION OF JUDGMENT

STATEMENT

The defendant has filed his motion and amended motion to set aside so much of the judgment herein as orders him to pay the plaintiff $25,000.00 on February 7, 1971, and on each 7th day of February thereafter for eight and one-half years. The original motion was filed on January 28, 1971; the amended motion being filed on February 3, 1971. The original judgment in this matter provided for the payment of $25,000.00 for ten and one-half years, but two of those payments were satisfied and included in a lump sum paid by defendant, along with the satisfaction of the other parts of said judgment, on August 7, 1970.

The original judgment in this matter was dated February 7, 1969, and provided for lump sum alimony to the wife in the sum of $500,000.00 which was to be partially satisfied by the retention of property held by the wife but which

was subject to restoration. In addition, the wife was to receive the deferred payments mentioned above, which were to be payable absolutely except that the wife should die during the period of payment.

The husband perfected and prosecuted an appeal from all portions of that judgment. The wife filed a cross-appeal from all portions of the judgment, but the cross-appeal was aborted for procedural reasons. After extensive briefings and a petition for rehearing before the Court of Appeals, portions of the trial court's judgment were modified, but the deferred payments were not modified. Mandate on the judgment as thus modified, and which was to be entered and followed by the trial court, was issued June 26, 1970.

From that date to the present, this Court has felt that its primary and sole function and responsibility was to follow the dictates of the Court of Appeals in enforcing the mandate of that Court as to the several provisions of the judgment therein rendered. The records of the case will reflect the many hearings, rehearings, arguments, briefs, et cetera attesting to the difficulty of this task.

Following the rendition of the judgment of the Court of Appeals in this case on June 26, 1970, that Court rendered a decision in *Colley* v. *Colley*, 460 S. W. 2d 821, on November 27, 1970. In *Colley* the Court of Appeals has apparently established new rules and guidelines to be followed by the bench and bar of this state in divorce actions involving issues of restoration and marital property and a wife's entitlement to alimony.

The gist of the husband's present motions in this matter is that if the standards and guidelines as set forth in *Colley* in November 1970 had been effective and applied in this case in June 1970, the result in this case would have necessarily been different. The husband now insists that the rule of *Colley* should be applied retroactively in this case insofar as the remaining deferred payments are concerned,

using the provisions of CR 60.02 as a procedural vehicle to litigate this question.

The wife, of course, strenuously denies that the rule of *Colley* can be applied retroactively under the decision rendered by the Court of Appeals in this case some five months prior thereto and its mandate issued thereunder.

JUDGMENT

The Court is of the opinion, as stated above, that, once the decision of the Court of Appeals was rendered and the mandate to this Court issued, all discretionary powers inherently invested in the trial court were ended, and the only function of this Court since that time has been to attempt to insure that the provisions of the decision rendered by the Court of Appeals in June 1970 were carried out. Consequently, the provisions of CR 60.02 do not give this Court jurisdiction to now use discretionary powers to alter or modify that final judgment and decision of the Court of Appeals. Obviously, recourse may be had by appeal from this order to determine whether the Court of Appeals now desires to amend its own decision and to make the remaining deferred payments of alimony subject to the rule which they later announced in the Colley decision.

The motion and motion as amended by the defendant are, therefore, overruled at the cost of defendant.

Approved, signed and entered of record on this 23rd day of February, 1971.

(s) James M. Lassiter, *Judge*
Marshall Circuit Court

APPENDIX D

COURT OF APPEALS OF KENTUCKY

RENDERED: JUNE 30, 1972
REHEARING DENIED: OCTOBER 6, 1972

CLYDE W. REED - - - - - - - - *Appellant*

v.

JEAN MOORE REED - - - - - - - - *Appellee*

Appeal from Marshall Circuit Court
Honorable James M. Lassiter, Judge

OPINION OF THE COURT BY COMMISSIONER CULLEN—AFFIRMING

The appeal here under consideration is from an order overruling a motion made to reopen that part of a divorce judgment relating to alimony payments.

On February 7, 1969, the Marshall Circuit Court granted Clyde W. Reed a divorce from his wife, Jean, on the ground of abandonment, but awarded Jean "alimony" in a lump sum of $500,000 payable within three months after judgment (reduced by credits to $390,000), plus $25,000 per year payable for a period of ten and one-half years, the obligation for the latter payments to cease upon Jean's prior death but to be payable in full, commuted amount on Clyde's prior death.

On an appeal to this court the judgment was affirmed, except for minor modifications as to the time allowed for

payment of the initial sum of $500,000. Reed v. Reed, Ky., 457 S. W. 2d 4.

The mandate on this court's opinion was issued on June 26, 1970. A hearing was scheduled in the circuit court for July 13, 1970, "for the purposes of resolving any questions that may arise out of the mandate of the Court of Appeals of Kentucky as it affects the judgment entered by this Court and any other matters that may be brought before this Court by counsel for either of the parties." In the meantime, issues arose as to attorney fees and as to interest and penalties on the supersedeas bond, and the hearing was continued to August 7, 1970. On that date the court entered a "Final Order" determining the issues as to attorney fees, interest and penalties; crediting Clyde for payments made on the initial obligation of $500,000; and directing when the remaining payments on that obligation should be made, in accordance with this court's mandate. The "Final Order" further specified the exact dates on which the $25,000 payments should be made. On the same day a "Supplemental Final Judgment" was entered making provisions for security for payment of the unpaid portion of the initial obligation of $500,000.

Subsequently, by agreement of the parties, Clyde paid before due the remaining portion of the initial obligation of $500,000, and paid the first of the $25,000 payments, and on November 6, 1970, the circuit court entered an "Agreed Order and Satisfaction of Judgment" which recited that the judgment was fully satisfied as to all obligations except the $25,000 payments thereafter coming due. This order contained the following clause:

> "This cause is now stricken, settled in full, including satisfaction in full of the judgment, with the exception of said future alimony payments; but this Court retains jurisdiction of the parties and of the

subject matter of this action for any and all necessary and proper orders relating to the future alimony payments."

Although the order is styled "Agreed Order and Satisfaction of Judgment," the document was not endorsed by the parties or their counsel nor is there anything in the record to indicate that there was any agreement except as to satisfaction of the judgment to the extent of the payments that had been made. For some unexplained reason the order was directed to be "entered of record as of August 7, 1970."

On November 27, 1970, this court handed down its opinion in Colley v. Colley, Ky., 460 S. W. 2d 821, restating the principles applicable to property restoration, property division, and alimony in divorce cases. The mandate was issued on that opinion on December 29, 1970.

On January 28, 1971, Clyde Reed filed in the Reed case the motion here in issue, in which he sought to have the judgment reopened as to alimony payments not yet due, for reconsideration in the light of *Colley*. The circuit court overruled the motion on the ground of lack of power to reopen the judgment entered pursuant to the mandate of this court.

In his motion to reopen the judgment, Clyde referred to the clause in the "Agreed Order and Satisfaction of Judgment" of November 6, 1970, which recited that the court retained jurisdiction "for any and all necessary and proper orders relating to future alimony payments," and he undertook to interpret this as a reservation by the circuit court of the power to *modify* the judgment as to future alimony payments. He asserts that under the authority of such cases as Keach v. Keach, 217 Ky. 723, 290 S. W. 708, the trial court by virtue of such reservation had power to reopen the judgment even though the future payments constituted a form of lump-sum alimony.

We do not consider the question of whether the power to modify a divorce judgment as to lump-sum alimony validly can be reserved, because it is our opinion that the trial court had no jurisdiction, procedurally, to insert the purported reservation clause in the November 6 order. There was no such reservation in the original judgment of February 7, 1969. Following the affirmance of that judgment by this court, with respect to the $25,000 payments, the circuit court had no jurisdiction on its own motion to amend the judgment. Caskey v. Nussbaum, 236 Ky. 848, 34 S. W. 2d 716; City of Lexington v. Garner, Ky., 329 S. W. 2d 54.

The reservation clause cannot be considered to have been inserted by agreement of the parties because the record does not show that there was any such agreement, nor was the so-called "Agreed Order and Satisfaction of Judgment" endorsed as agreed to.

In his motion to reopen, Clyde undertook to invoke CR 60.02 as a further source of power in the circuit court to reopen the judgment. He argues here that the *change* in the law of alimony and property settlement which he says was made in *Colley* was such as to warrant relief on the ground set forth in Clause (5) of CR 60.02 of its being "no longer equitable that the judgment should have prospective application."

We do not consider the situation in the instant case to be one coming within Clause (5) of CR 60.02. In the first place, the judgment here in question has "prospective application" only in a limited sense, in that the only prospective feature consists of a plan for deferred payment of a fixed obligation. In the second place, there is no certainty that the ultimate obligation of Clyde Reed under a judgment based on Colley would be so different from that under the present judgment as to establish the equitable basis contemplated by CR 60.02 for a reopening. It is quite possible that the same result would be achieved through a

division of "team-effort" assets as was achieved in the name of alimony. We note that the trial court, in the findings and conclusions on which the original judgment was based, stated that "the Court is acutely aware of the overall contribution which she has made for some twenty years in the keeping of the home, rearing of the children and making herself satisfied with social activities that were far less financially demanding than one might expect in her circumstances." We also note that in the opinion of this court in Reed v. Reed, Ky., 457 S. W. 2d 4 @ 8, reference was made to the holding in Cooke v. Cooke, Ky., 449 S. W. 2d 216, that where "property has been accumulated in the course and by virtue of the joint efforts of husband and wife as a marital unit, one carrying out his responsibilities and the other carrying out hers * * * upon dissolution of the marriage, the trial court should be free to weigh it up and determine when, whether and how it is to be cut off and separated out," and the opinion said: "Here it appears that the same reasoning should apply." The opinion further said: "Although Jean worked little in the various business ventures she ran the home at such a minimum expense, commensurate with the family income and wealth, that we cannot say she did not assist in creating that wealth." So it appears that the concept of *Colley* with respect to division of "team-effort" property was in substance applied in the Reed judgment. This was recognized in the opinion in *Colley* when reference was made to the Reed case as one in which this court accepted an award to the wife of a fraction of less than one-third "of the jointly acquired estate."

It is true that a change in the law was recognized as a basis for reopening a judgment as to its prospective application, in National Electric Service Corp. v. District 50, UMW, Ky., 279 S. W. 2d 808. However, in that case the change in the law definitely removed the basis for the judg-

ment, and the judgment was one of continuing prospective application in that it regulated future situations.

It is our opinion that a reopening of a judgment, as to its prospective application, on the ground of a change in the law, should be done only in aggravated cases where there are strong equities. Cf. City-Planning Planning Commission v. Fayette County Fiscal Court, Ky., 449 S. W. 2d 776; 46 Am. Jur. 2d, Judgments, Sec. 768, p. 930. We do not consider the present case to be such a one.

The judgment is affirmed.

All concur except Osborne, J., who dissents.

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DISSENTING OPINION BY JUDGE OSBORNE
Rendered: June 30, 1972

In my opinion the majority opinion in this case is defective in so many respects that I will have to deal with them in separate numbered paragraphs.

I

The majority opinion in effect finds that that portion of the judgment which reserved the right to reopen was not agreed to by the parties and that the circuit judge on his own motion amended the judgment. The problem with this position is that the record does not bear out the majority opinion. At a hearing before the court prior to the drafting of the judgment the following colloquy took place between the attorneys and the judge:

> "Mr. Lovett: . . . and she will also give to Mr. Reed a complete release of all claims which she has against him arising out of this action except the $25,000.00 alimony payments for the future. . . .
>
> Judge: The attorneys for both parties have agreed to this method of settlement and that the attorneys for the defendant will be responsible for the drafting of a formal order and judgment in compliance with the agreement; and it will be submitted to the Court at the earliest possible time *after approval by the attorneys for both sides* and will be signed and entered as of this date:
>
> Mr. Lovett: That will be satisfactory with the defendant.
>
> Mr. Reed: That will be satisfactory with the plaintiff." (Emphasis added.)

It will be noted from the above that the court directed the attorneys not to submit the drafts until "after approval by the attorneys." I believe this court can do nothing but

assume that the drafts were so approved. Attorneys for appellee do not deny that they approved the drafts. They carefully skirt this issue by saying that the order was not an agreed order because neither the parties nor their attorneys signed the order so entered. For this court to now sua sponte say that the trial court injected this clause into the order on its motion is not supported by the record.

II

In my opinion appellee did not properly attack the reservation of jurisdiction in the trial court. Certainly, she does not deny that she received a copy of the order upon its entry. CR 52.02 provides:

> "Not later than 10 days after the entry of judgment the court on its own initiative or on motion of a party . . . may amend its findings or make additional findings and may amend the judgment accordingly."

Appellee upon receiving a copy of the order certainly had an obligation to move the court to strike this language if she had not agreed to it. We have previously held that where a jury returns a verdict patently defective on its face the party must immediately move that the jury be recommitted for correction of the verdict. See Stucker v. Bibble, Ky., 442 S. W. 2d 578; Commonwealth, Department of Highways v. Bauman, Ky., 468 S. W. 2d 315. Also, in W. R. Beard, Executor, et al. v. Economy Finance Corp., Ky., ____ S. W. 2d ____, rendered March 31, 1972, we held that where a party failed to move for additional findings under this rule in a case where the trial court had failed to make sufficient findings, failure to so move was fatal and he could not raise the issue for the first time upon appeal. It is my opinion the same rule should apply here. Even if Mrs. Reed's attorney did not agree to the insertion of this matter in the order they had an affirmative obligation to

move to strike it in the circuit court and could not wait until the matter got to this court and raise it for the first time.

III

If I understand the majority opinion, the court is saying that since there is no certainty that the ultimate obligation of Clyde Reed under a judgment based on Colley would be different from the present judgment his claim does not have sufficient equity to permit reopening under CR 60.02. Under this type of reasoning, we could "guess" 90% of those who appeal to this court out. We have in the last several months remanded a large number of cases to be considered under Colley where there was no guarantee that the ultimate result would be different. See Goff v. Goff, Ky., ___ S. W. 2d ___, rendered May 26, 1972; Noel v. Noel, Ky., ___S. W. 2d ___, rendered May 12, 1972; Peterson v. Peterson, Ky., ___ S. W. 2d ___, rendered April 28, 1972; Coleman v. Coleman, Ky., ___ S. W. 2d ___, rendered March 31, 1972; Dahlenburg v. Dahlenburg, Ky., ___ S. W. 2d ___, rendered March 31, 1972; Moore v. Moore, Ky., 477 S. W. 2d 792, rendered March 3, 1972; Clark v. Clark, Ky., 471 S. W. 2d 740, rendered October 8, 1971; Howard v. Howard, Ky., 469 S. W. 2d 353, rendered June 29, 1971.

IV

The trial court designated the award to Mrs. Reed as alimony. The divorce was granted to Mr. Reed. Under Colley, Mrs. Reed could have received nothing unless this court found that she should have been awarded the divorce. I assume the basis of the court's ruling is that this court is considering the award to be not alimony but jointly acquired property or marital property. If this be the case, the court is still in error for the original Reed case was tried under the old Heustis rule under which we were awarding a percentage of the marital property without regard to the respective contribution of the parties to the

accumulation of the property. If this proceeding should be remanded to the trial court as Mr. Reed now requests, the hearing would have to be conducted under Chapter 182 of the Acts of 1972 as Section 26(3), (4) of that Act provides:

> "(3) This Act applies to all proceedings commenced after its effective date for the modification of a judgment or order entered prior to the effective date of this Act.
>
> (4) In any action or proceedings in which an appeal was pending or a new trial was ordered prior to the effective date of this Act, the law in effect at the time of the order sustaining the appeal or the new trial governs the appeal, the new trial, and any subsequent trial or appeal."

If the proceedings are controlled by Chapter 182, the results could be considerably different from those incorporated in the original judgment as the trial court would be bound to consider the wife's contribution to the accumulation of the estate.

V

When Mrs. Reed filed her suit, she requested that the court award her *alimony*. The trial court, when entering the judgment, made an award of *alimony*.. Appeal was taken to this court and we affirmed this award of *alimony*. The case went back to the circuit court. It modified its judgment in accordance with the mandate of this court and reserved the right to modify future *alimony* payments. Motion was made before the circuit court to modify *alimony* payments. The circuit court denied that motion because it was of the opinion it did not have jurisdiction. Appeal was taken to this court to review the actions of the circuit court in respect to *alimony* payments. The majority opinion of this court affirms the action of the circuit court and recites

as its reason for doing so that the payments were never *alimony* at all. I would suggest to the majority they should cite as authority for their action today "Alice in Wonderland."

For the foregoing reasons, I respectfully dissent.

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APPENDIX E

COURT OF APPEALS OF KENTUCKY

File No. W-277-71

CLYDE W. REED - - - - - - - *Appellant*

v.

JEAN MOORE REED - - - - - - - *Appellee*

ORDER

On motion of the Appellant, Clyde W. Reed, by counsel, for an order staying enforcement of this Court's mandate dated October 12, 1972, pending his application to the Supreme Court of the United States for a writ of certiorari and the undersigned Judge of the Court of Appeals of Kentucky being sufficiently advised,

IT IS THEREFORE, ORDERED

That the execution and enforcement of this Court's mandate dated October 12, 1972, is hereby stayed for a period of not to exceed 90 days from the date hereof unless otherwise extended pursuant to Rule 1.445(c) of the Rules of this Court, and the Appellant, Clyde W. Reed, having produced in court a bond as required under Section 2101(f) of the Judicial Code (28 USC 2101(f)) and the bond having been examined and approved by this Judge, it is hereby approved and same is certified to the Clerk of the Court of Appeals of Kentucky for filing.

Given under my hand this the 25th day of October, 1972

/s/ Scott Reed
Judge,
Court of Appeals of Kentucky

FILE COPY

JAN 31 1973

MICHAEL ROBAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

72-950

CLYDE W. REED - - - - - - Petitioner

versus

JEAN MOORE REED - - - - - Respondent

On Petition for Certiorari to the
Kentucky Court of Appeals

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

72-950

CLYDE W. REED - - - - - - *Petitioner*

v.

JEAN MOORE REED - - - - - *Respondent*

ON PETITION FOR CERTIORARI TO THE
KENTUCKY COURT OF APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED FOR REVIEW

1. Did that part of the original divorce judgment of February 7, 1969, awarding respondent $25,000.00 per year for 10-½ years constitute a deprivation of petitioner's property by the State without due process of law in violation of the Fifth and Fourteenth Amendments? (1a-4a *infra,* "Motion To Set Aside Portion of Judgment".)

2. Does an attempt to justify the award on KRS 403.065 violate the Fifth and Fourteenth Amendment? (3a, *infra.*)

STATEMENT OF THE CASE

A divorce judgment requiring (among other things) the petitioner (husband) to pay respondent (wife) the sum of $25,000.00 per year for 10-½ years was entered by the Marshall Circuit Court on February 7, 1969 (A. 46 of Petition). The petitioner appealed the judgment to the Kentucky Court of Appeals, where that part of the trial court's judgment awarding respondent $25,000.00 per year for 10-½ years was affirmed and rehearing denied on June 26, 1970 (A. 48 of Petition).

The petitioner, on January 28, 1971, filed a "Motion To Set Aside Portion Of Judgment" in the Marshall Circuit Court, contending that under an order of the circuit court dated August 7, 1970, the trial court had retained jurisdiction to alter, amend or set aside that portion of the judgment awarding the $25,000.00 annual payments; that under the opinion of the Kentucky Court of Appeals in the case styled *Colley* v. *Colley*, 460 S. W. 2d 821, the court had "repudiated its former claim of power to judicially repeal KRS 403.060". (1a-4a, *infra*.) The motion further contended that the February 7, 1969, judgment constituted ". . . a deprivation of Clyde's property by the State without due process of law in violation of the Fifth and Fourteenth Amendments . . .", and asserted that, "An attempt to justify the award on KRS 403.065 would likewise violate the Fifth and Fourteenth Amendments . . ." (*ibid*). The petitioner filed two amended motions in the trial court without further mention of

constitutional provisions (5a-7a, *infra*). The trial court entered an order overruling petitioner's motion as amended, but made no ruling (or mention) therein on the constitutional contentions asserted in petitioner's original motion to set aside a portion of the judgment (A. 75-77 of Petition). On appeal of the trial court's order, the petitioner filed a "Statement of Points" (8a, *infra*) pursuant to Rule 75.04 of the Kentucky Rules of Civil Procedure.[1] It did not include any constitutional question as a point relied upon on the appeal.

Petitioner's brief in the Kentucky Court of Appeals did not raise any constitutional question (9a-18a, *infra*). Nor did his petition for rehearing filed in that court (19a-26a, *infra*).

The Kentucky Court of Appeals made no ruling on any constitutional question in affirming the trial court's order (A. 78-88 of Petition; 484 S. W. 2d 844).

ARGUMENT

The Petition For Certiorari Should be Denied Under Rule 19.1(a), Supreme Court Rules.

The respondent's Statement of the Case (pp. 2-3, *supra*) cites those portions of the record that establish beyond dispute the fact that no state court has "decided a federal question of substance" as this Court requires under its Rule 19.1(a) governing the grant or

[1] CR 75.04 provides, in part: "No assignment of errors is necessary. If the appellant does not designate for inclusion the complete record and all the proceedings and evidence in the action, he shall serve with his designation a concise statement of the points on which he intends to rely on the appeal. . . ."

denial of certiorari. Although petitioner did "mention" Due Process and the Fifth and Fourteenth Amendments in his original motion to set aside a portion of the judgment, the trial court did not decide any federal question. On appeal from the trial court's order, the Kentucky Court of Appeals was not asked by the petitioner to decide any federal question, and it did not consider or decide any such action.

The petition should be denied under Rule 19.1(a) of the Supreme Court Rules because of the petitioner's failure to timely raise a federal question in the Kentucky Court of Appeals. *Wilson* v. *Cook*, 327 U. S. 474, 66 S. Ct. 663, 668; *Lear, Incorporated* v. *Adkins*, 395 U. S. 708, 89 S. Ct. 1902, 1913-14, 1916-17.

CONCLUSION

We respectfully suggest that the petition for certiorari should be denied.

Respectfully submitted,

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L. M. Tipton Reed
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Mayfield, Kentucky 42066

Attorneys for Respondent

CERTIFICATE OF SERVICE

I certify that I am a member of the bar of the United States Supreme Court; that I have entered my appearance as counsel for respondent in accordance with the rules; and that I have served 3 copies of the foregoing Brief For Respondent In Opposition upon Honorable John C. Lovett, Lovett and Lewis, Post Office Box 165, Benton, Kentucky 42025, said address being within 500 miles from that of the undersigned, by depositing same in the United States Post Office at Hopkinsville, Kentucky, first class, postage prepaid, on January ..., 1973 all in accordance with Rule 33(1) of the Rules of the United States Supreme Court.

Dated this 29 day of January, 1973

WILLIAM E. SCENT
KEITH, SCENT, KIRKHAM & WALTON
317 West 9th Street
Hopkinsville, Kentucky 42240

MARSHALL CIRCUIT COURT

Civil Action No. 2047

JEAN MOORE REED - - - - - - - *Plaintiff*

v.

CLYDE W. REED - - - - - - - *Defendant*

MOTION TO SET ASIDE PORTION OF JUDGMENT

Comes the defendant and moves the Court to set aside the following portion of the judgment of this Court entered on February 7, 1969:

> "Additionally, defendant shall pay to the plaintiff the sum of Twenty-Five Thousand ($25,000.00) Dollars a year for a period of ten and one-half (10 ½) years, each annual payment to be in a lump sum, the first of which shall begin one (1) year from the date of this judgment and continue from year to year on the same annual date thereafter with the last payment being for one-half (½) of such annual sum. The amounts represented by the deferred payments of alimony shall be payable absolutely except that in the event of the death of the wife during said period of time, any amounts that would have been due to be paid if she had lived shall be voided, and no amount shall be payable to her estate. In the event of the death of the husband during said ten and one-half year period of time, his estate shall be liable to pay to the wife in one lump sum, discounted at the rate of six (6) per cent per annum, any and all amounts remaining due and unpaid as of the date of the husband's

death. It is the intent of the Court that these deferred payments of alimony shall qualify under the Internal Revenue Laws to be tax deductible to the husband and taxable to the wife."

In support thereof, defendant states:

1. This motion is filed before the payment of February 7, 1971 is due or payable and is, therefore, timely.

2. This Court has jurisdiction to alter, amend or set aside the above quoted portion of said judgment. The Court retained jurisdiction for this purpose in its "Agreed Order and Satisfaction of Judgment" dated August 7, 1970 which provided:

> "This cause is now stricken, settled in full, including satisfaction in full of the judgment, with the exception of said future alimony payments; but this Court retains jurisdiction of the parties and of the subject matter of this action for any and all necessary and proper orders relative to the future alimony payments".

3. On November 27, 1970, the Court of Appeals rendered its opinion in *Theodore Thelmer Colley* v. *Helen Barrs Colley,* holding that an award of alimony to the wife violates KRS 403.060 unless (a) she does not have sufficient estate of her own and (b) she is sufficiently free from fault to warrant judicial finding that she is entitled to a divorce. (A copy of that opinion is attached hereto for the convenience of the Court). The Court of Appeals' mandate in that case was handed down on December 29, 1970 and the decision is now final. The Court of Appeals has thus repudiated its former claim of power to judicially repeal KRS 403.060.

4. In the instant case, the judicial finding that Jean was solely at fault has become final. It is manifest from

the record of the August 7, 1970 hearing that she now has "sufficient estate of her own". On both grounds the judgment awarding her alimony of $25,000.00 per year is unlawful and void and should be set aside.

5. The judgment of February 7, 1969 ordering Clyde to pay Jean $25,000.00 on February 7, 1971, and annually thereafter for 9½ years as "deferred alimony" violates KRS 403.060, is beyond the statutory power of the Court to award, and is unconstitutional and void. Said judgment constitutes a deprivation of Clyde's property by the State without due process of law in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States.

6. The record shows that on August 7, 1970 Clyde paid Jean in cash the sum of $513,010.15, all except $47,663.85 being tax-free to her. It shows that on the same day she received unencumbered title to a lot in Murray, Kentucky valued at not less than $7,200.00. Her estate, prudently invested, will yield an income of approximately $35,000.00 per year without consuming the principal.

7. The award of $25,000.00 per year to Jean is not authorized by the restoration of property statute (KRS 403.065). This statute permits restoration to Jean only of property which Jean "obtained, directly or indirectly, from or through" Clyde during the marriage. It is beyond the statutory power of the Court to "restore" to Jean (by way of periodic alimony) property greatly in excess of that which she actually received from Clyde during the marriage. The courts possess no greater power to judicially rewrite the KRS 403.065 than to judicially repeal KRS 403.060. The judgment for $25,000.00 per year is unlawful and void and beyond the statutory power of the Court to award and should be set aside. An attempt to justify the award on KRS 403.065 would likewise violate the Fifth and Fourteenth Amendments to the U. S. Constitution.

8. The $25,000.00 per year award should be set aside on the further ground that it is manifestly so unfair and unjust as to amount to a travesty. To award a guilty wife $25,000.00 per year alimony when she already has an estate in excess of one-half million dollars, an annual income of about $35,000.00 and furs, jewelry and a Lincoln Continental automobile (all given to her by Clyde before the separation) is so grossly unfair as to shock the conscience.

Clyde W. Reed
By: John C. Lovett
Lovett & Lewis
Benton, Kentucky 42025

Raymond B. Dycus
Smithland, Kentucky 42081

NOTICE

Take notice that the foregoing MOTION TO SET ASIDE PORTION OF JUDGMENT will be brought on for hearing before the Hon. James M. Lassiter, Judge of the Marshall Circuit Court, at the Courthouse in Benton, Kentucky, on Friday, February 5, 1971, at 9:00 A.M. or as soon thereafter as counsel can be heard.

John C. Lovett

CERTIFICATE OF SERVICE

I hereby certify that the foregoing MOTION TO SET ASIDE PORTION OF JUDGMENT and NOTICE were served upon William E. Scent, Esq., Reed, Scent and Walton, 621 Broadway, Paducah, Kentucky 42001, and upon L. M. Tipton Reed, Esq., Neely and Reed, Lawpart Building, Mayfield, Kentucky 42066, attorneys for Plaintiff, by mailing a true and correct copy thereof to them, by U. S. Mail, First Class, postage prepaid, on this the *28th* day of January, 1971.

AMENDED MOTION TO SET ASIDE PORTION OF JUDGMENT

Comes defendant and amends and supplements his motion to set aside portion of judgment, filed herein on January 28, 1971 in the following respects:

1. The defendant further moves the Court to vacate and set aside so much of the Court's "Final Order" dated August 7, 1970, filed August 7, 1970, as reads as follows:

"4. The plaintiff shall have further judgment against the defendant for the following amounts which shall be due and payable on the dates shown:

* * * * * *

(i) Annual alimony in the sum of $25,000.00 payable each year, the next payment being due and payable on the 7th day of February, 1971, and a like amount being due and payable on the 7th day of February 1972, 1973, 1974, 1975, 1976, 1977, 1978 and 1979 without interest, and a final payment of $12,500.00 being due and payable on February 7, 1980, without interest. If any installment is not paid when due six (6) per cent interest shall be due from date."

2. Since filing the motion on January 28, 1971, the decision of the Court of Appeals in *Colley* v. *Colley*, referred to in paragraph 3 of said motion, has been published and is reported in 460 S. W. (2d) 821, advance sheet No. 3.

Clyde W. Reed
By: John C. Lovett
Lovett & Lewis
Benton, Kentucky

Raymond B. Dycus
Smithland, Kentucky

NOTICE

Take notice that the foregoing Motion to Set Aside Portion of Judgment, as amended, will be brought on for hearing before the Honorable James M. Lassiter, Judge of the Marshall Circuit Court, at the Courthouse in Benton, Kentucky on Friday, February 5, 1971 at 9:00 A.M. or as soon thereafter as counsel can be heard.

John C. Lovett

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Amended Motion to Set Aside Portion of Judgment and Notice were served upon William E. Scent, Esq., Reed, Scent and Walton, 621 Broadway, Paducah, Kentucky 42001, and upon L. M. Tipton Reed, Esq., Neely and Reed, Lawpart Building, Mayfield, Kentucky 42066, attorneys for plaintiff, by mailing a true and correct copy thereof to them, by U. S. Mail, First Class, postage prepaid, on this the 3rd day of February, 1971.

John C. Lovett

Filed February 4, 1971.
W. J. Brien, Jr., Clerk.

SECOND AMENDMENT TO MOTION TO SET ASIDE PORTION OF JUDGMENT

For further ground for setting aside the portion of the judgment herein which has prospective application, defendant states:

1. Said judgment sought to be set aside has prospective application only, and in view of the decision in *Colley* v. *Colley,* rendered after entry of judgment, and the changes in circumstances which have occurred subsequent to entry of the judgment, it is no longer equitable that the judgment should have prospective application and, therefore, it should be set aside under CR 60.02(5). Moreover, the reasons cited in the motion are of an extraordinary nature justifying relief under CR 62.02(6).

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By: John C. Lovett
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Raymond B. Dycus
Smithland, Kentucky 42081
Attorneys

NOTICE

Please take notice that the foregoing SECOND AMENDMENT TO MOTION TO SET ASIDE PORTION OF JUDGMENT will be submitted to the Hon. James M. Lassiter, Judge of the Marshal Circuit Court, at his office in Murray, Kentucky, on Monday, February 22, 1971.

John C. Lovett

Filed February 25, 1971.
W. J. Brien, Jr., Clerk

STATEMENT OF POINTS

The points to be relied upon by defendant on his appeal to the Court of Appeals are as follows:

1. The Chancellor, having retained jurisdiction of the parties and the subject matter "for any and all necessary or proper orders relating to future alimony payments", possessed jurisdiction to enter an order on defendant's motion to set aside or modify such award of alimony.

2. The Chancellor had jurisdiction under CR 60.02 to enter an order setting aside future alimony payments.

This the *25* day of *February*, 1971.

John C. Lovett
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Raymond B. Dycus
Smithland, Kentucky 42081
Attorneys

COURT OF APPEALS OF KENTUCKY

File No. W-277-71

CLYDE W. REED - - - - - - - *Appellant*

v.

JEAN MOORE REED - - - - - - - *Appellee*

BRIEF FOR APPELLANT

STATEMENT OF THE FACTS

This appeal involves only the question of the Chancellor's jurisdiction to set aside a judgment for prospective application.

This is the second appeal in this case. The first appeal was docketed as Civil Action File No. S-73-69, and the decision of this Court is to be found in *Reed* v. *Reed*, Ky., 457 S. W. 2d 4 (1969).

On the prior appeal, this Court affirmed in part and reversed in part the Chancellor's judgment. (The Chancellor's original judgment is to be found at pages 1-32 of the Record). The mandate was issued June 26, 1970 and filed June 27, 1970 (R. 32, 33).

Thereafter, the Chancellor held a hearing to determine all steps necessary to comply with this mandate. This hearing was held on August 7, 1970, and a transcript of the proceedings at that hearing is attached to the record (R. 61). At this hearing, orders were entered confirming the satisfaction in full of the judgment, interest, penalties, etc., up to August 7, 1970, involving payment by Clyde to Jean of well over $500,000 (R. 54-57, 57-58, 59). Appellant's attorneys were instructed to draft "a formal order and

judgment in compliance with the agreement" and submit it to the court (Transcript of August 7, 1970 hearing, p. 47).

A draft was submitted. Appellant's counsel did not object. The Chancellor, however, prepared his own "Agreed Order and Satisfaction of Judgment", dated it as of August 7, 1970, and filed it November 6, 1970. It is to be found at pages 62 and 63 of the Record. This order recites that all payments then due (including the first annual $25,000 alimony) had been fully satisfied. It continued:

> "This cause is now stricken, settled in full, including satisfaction in full of the judgment, with the exception of said future alimony payments; *but this Court retains jurisdiction of the parties and of the subject matter of this action for any and all necessary and proper orders relating to the future alimony payments*" (R. 63). (Emphasis supplied.)

At that time, 9½ annual alimony installments of $25,000 each, remained to be paid, the next payment becoming due on February 7, 1971.

Three weeks later, this Court handed down its opinion in *Colley* v. *Colley*, Ky., 460 S. W. 2d 821 (1970). The mandate issued on December 29, 1970. This decision drastically changed the approach to matters of alimony and restoration of property in divorce cases.

Prior to the due date of the next $25,000 alimony payment, Appellant moved the Chancellor to vacate and set aside so much of the original judgment as ordered Clyde to pay $25,000 alimony per year for the next 9½ years (R. 75), and attached a copy of the *Colley* decision. He amended the motion after *Colley* was officially reported (R. 93-94), and amended it a second time to recite CR 60.02 as additional grounds for the Chancellor's jurisdic-

tion to grant relief (R. 96-97). Briefs were filed and the matter submitted without oral argument.

On February 23, 1971, the Chancellor entered his "Order on Motion and Amended Motion on (sic.) Defendant to Set Aside Portion of Judgment" (R. 102-105). He held that he had no "discretionary powers" to grant relief. He held that not even CR 60.02 gave him "jurisdiction to now use discretionary powers to alter or modify that final judgment and decision of the Court of Appeals" (R. 104). Evidently, he felt only the Court of Appeals possessed original jurisdiction to modify or amend the judgment he had entered. He said, "Obviously, a recourse may be had by appeal from his order to determine whether the Court of Appeals now desires to amend its own decision and to make the remaining deferred payments to (sic.) alimony subject to the rule which they later announced in the Colley decision" (R. 104).

This appeal followed.

The issue is simply one of jurisdiction. Did the Chancellor possess jurisdiction to pass on the merits of the motion to vacate the judgment as it applied to *future* alimony installments?

We submit that the Chancellor is vested with jurisdiction to pass on the merits of the motion.

ARGUMENT

I.

Having Specifically Retained Jurisdiction to Enter "Any and All Necessary and Proper Orders Relating to the Future Alimony Payments", the Chancellor's Jurisdiction is Clear.

Unless the quoted portion of the order which the Chancellor prepared and entered on February 23, 1971 is a nullity, the Chancellor possessed jurisdiction to pass on the merits of the motion.

"In considering whether jurisdiction exists to modify an award the situations categorize into two types: Where the decree itself reserves jurisdiction (whether based upon an agreement of the parties, or initially determined by the court), or, where the decree does not reserve jurisdiction. *The first type is clear, such decree may be modified.*" *Petrilli* 'Kentucky Family Law' (1969), page 414. (Emphasis supplied.) *Keach* v. *Keach*, 217 Ky. 723, 290 S. W. 708 (1927); *Boehmer* v. *Boehmer*, 259 Ky. 69, 82 S. W. 2d 199 (1935); *Parsons* v. *Parsons*, 26 Ky. L. Rep. 256, 80 S. W. 1187; *Pauley* v. *Pauley*, 280 Ky. 66, 132 S. W. 2d 512 (1939); *Staton* v. *Staton*, 164 Ky. 688, 176 S. W. 21 (1915); *Honaker* v. *Honaker*, 267 Ky. 129, 101 S. W. 2d 679 (1937); *Duff* v. *Duff*, 275 Ky. 367, 121 S. W. 2d 933 (1938); *Scott* v. *Robertson*, 212 Ky. 392, 279 S. W. 625 (1926); *Jones* v. *Jones*, 216 Ky. 810, 288 S. W. 737 (1926); *Turner* v. *Ewald*, 290 Ky. 833, 162 S. W. 2d 181, 188 (1942).

The rule is stated in *Keach* v. *Keach. supra*, as follows:

"The rule in this jurisdiction is that a judgment for alimony in a lump sum becomes final after adjournment of the term of court at which it is rendered, and cannot thereafter be modified *unless the court in its judgment retains the right to do so. Scott* v. *Robertson*, 212 Ky. 392, 279 S. W. 625. See, also, 19 C.J. §616, p. 269. And the same rule prevails where the payment is made in installments, if the judgment for alimony is a sum in gross. *Jones* v. *Jones*, 216 Ky. 810, 288 S. W. 737." (Emphasis supplied.)

II.

CR 60.02(5) and (6) Empower the Chancellor to Set Aside a Judgment Even After Affirmance by the Court of Appeals.

CR 60.02 provides:

> "On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order or proceeding upon the following grounds: . . . (5) the judgment is void, or has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, *or it is no longer equitable that the judgment should have prospective application;* or (6) any other reason of an extraordinary nature justifying relief."

This Rule confers on this Court complete power and jurisdiction to modify or set aside the prior judgment *insofar as it has prospective application.*

This authority exists even though the original judgment has been affirmed by the Court of Appeals.

In *National Electric Service Corp.* v. *District 50. UMW,* Ky., 279 S. W. 2d 808 (1955), the plaintiff had obtained a temporary injunction against the union's picketing. On appeal, the Court of Appeals affirmed. The injunction was made permanent. Later, the Supreme Court in another case issued an opinion that the jurisdiction of the NLRB in such matters was exclusive. Five months later the union moved to set aside the injunction under CR 60.02. Relief was granted by the Chancellor, and the company appealed. The question involved was: can the Chancellor, after an injunction is affirmed as the law of the case by the Court of Appeals, set the injunction aside? The Court of Appeals held that the Chancellor had jurisdiction under CR

60.02(5) to set it aside "for prospective application". The court said:

> "However, as we hope our rather long discussion of the question has demonstrated, neither of these contentions is an acceptable basis for a decision here and we must look again to CR 60.02 to determine if the court had the right to set aside its earlier judgment. We think he did have the right for two reasons: First, because subsection 5 of the above quoted rule permits such action when subsequent events justify relief from the operation of the judgment. Of this subsection, in Clay, CR, page 534, it is said:
>
> "'This ground had no counterpart in the Civil Code. However, it was substantially the basis of the ancient writ of audita querela. That writ and this ground are founded upon the right to relief when one is adversely affected by a judgment because of some defense, or discharge, or other circumstance arising subsequent to its entry.
>
> "'Relief from the judgment may not only be granted if it has been satisfied, released or discharged, but also if a prior judgment upon which it is based has been reversed or otherwise vacated, or if it would be inequitable to give it further prospective application.'
>
> *"The opinion in the Garner case which established law that had not been applicable in this Commonwealth prior to its decision, was certainly a circumstance arising subsequent to the entry of the judgment which warranted relief and we further believe it would be inequitable to give further prospective application to a principle of law which is no longer evidenced by the opinions of the state courts or the courts of the United States"* (p. 812). (Emphasis supplied.)

In *Cawood* v. *Cawood,* Ky., 329 S. W. 2d 569 (1959) a divorce judgment for the wife, awarding her $21,500 lump sum, was affirmed on appeal. Nearly a year after the judgment was entered and had been paid, she filed a motion under CR 60.02 to increase the lump sum because of newly discovered evidence (she had developed cancer). The Chancellor overruled the motion and she appealed. This Court affirmed on the ground that there was insufficient newly discovered evidence to warrant changing the lump sum award. The court added:

> "While CR 60.02 authorizes the setting aside of a judgment 'if it is no longer equitable that the judgment should have prospective application', we think it is clear that this ground relates only to such judgments as remain in whole or in part unenforced, and thus are capable of having 'prospective application' and does not apply to a judgment which has been satisfied in full" (p. 571).

Thus, it makes no difference that the original judgment was affirmed on appeal; the Chancellor possesses power to set it aside under CR 60.02 if it is on longer equitable that it have prospective application. This was reaffirmed in *Fortney* v. *Mahan,* Ky., 302 S. W. 2d 842 (1957). There the circuit court judgment settling an estate was affirmed by the Court of Appeals. After the mandate issued, Fortney filed a motion under CR 60.02 for relief from the judgment. As to the jurisdiction of the Chancellor to grant relief this Court said:

> "Direct attacks upon a judgment, as by appeal or by motion for new trial, are commonly accepted practice. *CR 60.02, in addition, provides the trial court with extensive power to correct a judgment even after recourse has been had to the usual methods of attack.*

> On motion, the Court is empowered to relieve a party from a final judgment under certain extraordinary circumstances and upon such terms as it deems just. CR 60.02 addresses itself to the sound discretion of the trial court" (p. 843). (Emphasis supplied.)

CR 60.02(5), according to Clay, codifies the ancient writ of *audita querela*. He said,

> "Relief may also be sought on this ground if a judgment has been satisfied, released or discharged, or if a prior judgment upon which it is based has been reversed or otherwise vacated, *or if for some reason it is no longer equitable that the judgment should have prospective application.* These grounds had no counterpart in the Civil Code. However, they are substantially the basis of the ancient writ of audita querela. That writ was founded upon the right to relief when one is adversely affected by a judgment because of some defense, or discharge, or other circumstance arising subsequent to its entry" (Clay, Kentucky Practice, Vol. 7. pp. 227-228). (Emphasis supplied.)

In *Taylor* v. *Mills*, Ky., 320 S. W. 2d 111 (1958) this Court acknowledged that CR 60.02 provided a remedy for relief from a final judgment in a case which had been before the Court of Appeals *four* previous times. It said:

> "It is true that CR 60.02 may provide a remedy for attacking a judgment even after there has been a final decision with respect thereto by the Court of Appeals. This was permitted under former Civil Code of Practice Section 518, which CR 60.02 supersedes (citing cases). However, no motion under CR 60.02 was made in the trial court, and we will not initially entertain such a motion" (p. 113).

And, in *Averitte* v. *Hutchinson,* Ky., 420 S. W. 2d 581 (1967) this Court, while it denied relief on plaintiff's CR 60.02 motion, approved the Chancellor's statement: "That the court has the right to act in behalf of the plaintiff in this matter is beyond question . . ." (p. 582).

In *Burke* v. *Burke,* Ky., 248 S. W. 2d 716 (1952) an award of $50.00 per month to the wife had been affirmed by the Court of Appeals (182 S. W. 2d 786). Five years later, the husband moved to modify this award. The Chancellor sustained the wife's demurrer. This Court said that the Chancellor erred. ". . . we think Mr. Burke's motion set forth sufficient grounds to warrant the granting of a hearing on his motion" (p. 716).

This Rule provides relief in criminal as well as civil cases. In *Balsley* v. *Commonwealth,* Ky., 428 S. W. 2d 614 (1968), Balsley, arrested for violation of parole from a life sentence, was surrendered to federal authorities for trial in Indiana for armed robbery where he was convicted and given a 10 year sentence. He filed a writ to set aside the life sentence in Kentucky on the ground that the surrender of his custody to federal authorities forfeited Kentucky's right to enforce completion of his life sentence. This Court, relying upon CR 60.02(5), set aside the remainder of the life sentence, saying that CR 60.02(5) preserves the remedies of *audita querela* which "may be directed against enforcement, or further enforcement, of a judgment which when rendered was just and unimpeachable". Accord: *Fanelli* v. *Commonwealth,* Ky., 423 S. W. 2d 255 (1968).

CONCLUSION

This brief deals only with the Chancellor's power or jurisdiction to pass on Appellant's motion to vacate the $25,000 per year award insofar as it requires *future* payments. It is not addressed to the merits of the motion. This Court has already declared that it "will not initially entertain" a motion under CR 60.02 (*Taylor* v. *Mills*, *supra*.)

We respectfully submit that on both grounds, i.e. the Chancellor's express retention of jurisdiction and the plenary power granted by CR 60.02, the Chancellor possessed jurisdiction to pass on the merits of defendant's motion.

Respectfully submitted,

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COURT OF APPEALS OF KENTUCKY

File No. W-277-71

CLYDE W. REED - - - - - - - *Appellant*

v.

JEAN MOORE REED - - - - - - *Appellee*

APPELLANT'S PETITION FOR REHEARING

STATEMENT

Appellant, Clyde W. Reed, petitions the Court for a rehearing of his appeal on the grounds (1) the Court has overlooked material facts in the record and has ignored the express terms of the law applicable to this appeal; (2) the Court in this case has simply *changed the law* to fit what evidently were preconceived ideas of this merits of this latest controversy between Clyde Reed and Jean Reed; and (3) the Court for the first time has denied a litigant hearing on the merits of his claim that "changes in circumstances" have made it "no longer equitable that the judgment should have prospective application" (R. 97), a claim on which Clyde is prepared to offer extensive and persuasive proof if given the opportunity.

Clyde has no delusions. He knows how difficult it is to view objectively and impartially *new* issues between him and Jean when *old* issues have been resolved in such an emotional and bitter atmosphere. Believing. however, that "great minds are never shut," he is confident that this Petition will be considered by judges who are not reluctant to permit the suggestion of appellate court error "to gambol freely on the cool green pastures of your mind."

ARGUMENT

I

The Court Has Amended CR 60.02(5) so as to Deny Clyde a Hearing

Clyde moved the trial court to vacate the judgment on the ground, among others, that changes in circumstances have made it "no longer equitable that the judgment have prospective application" (R. 97). He was prepared to introduce proof on this allegation—proof of changes in his and Jean's financial postures, proof of changes in the parties' conditions of health, proof of facts which would render simply unconscionable the requirement that he continue to pay Jean $25,000 per year for 9½ years, and proof that such requirement offends the most elementary concepts of justice. The lower Court overruled his motion on jurisdictional grounds alone. This appeal was addressed only to the jurisdictional issue. The *merits* were not briefed.

The Court has held that no matter how unjust or unconscionable the future payments, Clyde can have no hearing. No court on earth has jurisdiction to give him a hearing. His future obligations are as inexorable as the sunrise!

The Court reached this unusual result by two devices. First, without prior precedent, it amended CR 60.02(5) to read "prospective application *in an unlimited sense.*" When arose this judicial tendency to construe so elastically well-settled procedure rules? This Court strictly enforces its *own* rules. It dismissed Jean's original cross-appeal (claiming in excess of $2 million) simply because she did not comply with RCA 1.080 which required the timely filing of a $50.00 cost bond and statement of cross-appeal. It has dismissed a meritorious appeal because the record on appeal was filed 1 day late. But where broad equities are involved and manifest injustice is about to occur, this

Court amends CR 60.02(5) *for the first time* to deny Clyde a hearing.

Second, the Court seems to require an absolute showing of inequity *in advance,* otherwise no court has jurisdiction to hear proof on the inequity. It says, for example, that "there is no certainty" that Clyde will prevail, irrespective of quality or quantity of his proof that prospective application of the judgment would be grossly inequitable. A hearing will produce proof of such "certainty." It says, for further example, that "It is quite possible" that Clyde would not prevail at a hearing on the merits. This is a statement of the obvious. Is it a valid reason to deny him a *hearing?*

The Court assumed that Clyde's *only* ground for relief under CR 60.02(5) was the change in law effected by *Colley* v. *Colley,* Ky., 460 S. W. 2d 821 (1970). It said (again for the first time) that a subsequent change in the law would support relief under CR 60.02(5) only in "aggravated cases." This unprecedented holding ignores the other valid reasons Clyde had (and was prepared to prove) for seeking relief under CR 60.02(5).[1]

II

The Court Has Overlooked Material Facts in the Record

The dissenting opinion points out the failure of the majority to consider the fact that the trial court's "Agreed Order and Satisfaction of Judgment" was delivered to Appellee's counsel, reviewed by them, and unopposed by them. They never denied agreeing to the "Agreed Order" until

[1]The appeal in *Colley* probably was pending in this Court when Clyde's "Petition for Rehearing," strongly urging this Court to return to the rule of *law* (as it shortly did in *Colley*) was overruled. Thus, Clyde senses that this Court is willing to follow the law in all cases except his. And, in absence of an evidentiary hearing, how can the Court know that this is not such an "aggravated case"?

this appeal was filed. We will not further dwell on this, except to say that if Appellees' counsel had been displeased by the trial court's express retention of jurisdiction, they never expressed such displeasure in the eight months which elapsed between their receipt of the "Agreed Order" in November, 1970, and their response to this appeal.

The most serious misconception of the record involves the Court's viewing of the $25,000 annual payments as representing installment payments to Jean of her proportionate part of the "team" property.

The Chancellor regarded the payments as support and maintenance payments. He said "the Court feels that the wife is entitled to *lump sum alimony* in the amount of Five Hundred Thousand ($500,000) Dollars." Thus, the lump sum alimony (or alimony in gross) was fixed at $500,000. This Court has belatedly and erroneously construed the original judgment as awarding lump sum alimony of $765,500, with $500,000 being payable immediately and the balance payable in $25,000 annual installments. This is construction by afterthought.

The $25,000 annual payments possess all the characteristics of support payments. For example:

(a) "Alimony" (i.e. support for the wife) ceases with the wife's death. However, the wife's entitlement to her portion of *jointly-accumulated property* survives her. It passes to her estate. The judgment provides that "in the event of the death of the wife during said [10½ year] period, any amounts that would have been paid if she had lived shall be voided." This termination of the husband's liability at the wife's death is inconsistent with "alimony in gross."

(b) "Alimony" (support) is income taxable to the wife and deductible by the husband.[2] On the other hand, "in-

[2]If the wife is separated from her husband, the wife's gross income includes periodic payments (whether or not made at regular intervals) received by her after the date of the enactment of this

(Footnote continued on following page.)

stallment payments discharging a part of an obligation the principal sum of which is . . . specified in the decree . . . shall not be treated as periodic payments" and are not income taxable to the wife nor deductible by the husband. Internal Revenue Code, 1954, as amended, Sec. 71(c)(1).[3] The trial court in the judgment stated,

> It is the intent of the Court that the $500,000.00 should be received by the wife without incurrence of tax liability thereon, and that the balance of the *alimony* payments specified shall meet the requirements of the Internal Revenue Code as to periodic payments and shall be tax deductible by the husband and taxable to the wife. (Emphasis supplied.)

The wife's liability for income taxes on the installment payments is inconsistent with "Alimony in gross."

As the dissenting opinion makes clear, both the trial court and this Court consistently referred to the annual installments as "alimony" and believed it to be such. To denominate them now as installment repayments of "team effort" property smacks of a *post hoc* rationalization of an antecedent opinion.

The Chancellor provided for payment of the commuted value of unpaid installments on Clyde's prior death. This, it will be argued, is not generally characteristic of "support and maintenance." However, the Chancellor has discretion to provide that the husband's obligation to "support and maintain" the wife survives his death and must be paid

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title from her husband under a decree entered after March 1, 1954, requiring the husband to make the payments for her support and maintenance." Internal Revenue Code, 1954, as amended, Sec. 71(a)(3).

[3]The so-called "ten year rule" (IRC, 1954, Sec. 71(c)(2)) applies only if "the principal sum . . . is specified in the decree . . ."

out of his estate." *Wides* v. *Wides*, 300 Ky. 344, 188 S. W. 2d 471, 475 (1945); see also dissenting opinion of Judge Shackelford Miller in *Desjardins* v. *Desjardins*, 308 F. 2d 111, 119 (C.A. 6, 1962). Nor is it uncharacteristic of "support and maintenance" to require the husband to give security for future support and maintenance payments. The law expressly provides for it (KRS 403.080). And the fact that Clyde's obligation will continue after Jean's remarriage does not evidence that the installments represent alimony in gross. The general rule is that all support and maintenance payments, in absence of statute or contrary language in the decree, continue after the wife's remarriage, 24 Am. Jur. 2d, *Divorce and Separation*, Sec. 645, p. 765.

III

The Court Misconstrued the Chancellor's Retention of Jurisdiction

The majority writes that the trial court had no "procedural jurisdiction" to insert in the "Agreed Order" a retention of jurisdiction for subsequent orders relating to future alimony payments. It bases this conclusion upon the observation that the original February 7, 1969, judgment contained no such reservation and this judgment was affirmed on appeal. Here the Court simply overlooks well-settled law that for good cause shown future support and maintenance payments may be modified *at any time* by the Chancellor, whether or not he expressly reserves jurisdiction. A reservation of such right in the original judgment would have been superfluous. Can its omission be determinative of Clyde's plea for a hearing? Similarly, insertion of such reservation in this Court's affirmance of the February 7, 1969 judgment would have been superfluous. In such affirmance this Court regarded the $25,000 install-

ments as "alimony," i.e. support and maintenance.[4] The express retention of jurisdiction in the "Agreed Order," *an order prepared by the Chancellor himself*, simply made clear that the future $25,000 alimony payments were not final and irrevocable. Can it now be regarded as a nullity?

CONCLUSION

With all due respect, we submit that the Court has grossly erred. We reject the suggestions that minds are fixed, that *no* power on earth can change them, that because of the bitterness of past issues between Clyde and Jean, the Court has prejudged the merits of all future issues between them. Clyde's insistence that he has been wrongfully denied a hearing which this Court has not hesitated to grant to all other litigants similarly situated is not simply a churlish plea.

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[4]This Court called these payments "periodic alimony." When Judge Osborne's dissent asserted that the *law* permitted support and maintenance to the wife only on a divorce "obtained by her," a concurring opinion admitted that the Court had indeed awarded "alimony" where no statutory right existed. The concurring opinion rationalized such action:

> In the instant case, the appellant has argued that he is willing to pay substantial amounts *for the support of his wife*—the only issue is how much. An able and conscientious trial judge carefully and meticulously undertook to effect what he conceived to be a fair and equitable result under existing law. No abuse of discretion on his part is shown in this aspect of the case. [*Reed* v. *Reed*, Ky., 457 S. W. 2d 4, 11 (1969)].

Thus, in the original affirmance, this Court regarded the $25,000 installments as payments "for the support of his wife." It refused to budge from its position that as a court of equity it had the right to award "alimony" even though the statute did not permit it (a position it has since changed).

Now, the Court says that it *never* was "alimony"; it was a division of team property all the time!

A famous inscription on Langdell Hall, Harvard Law School, is relevant:

NON SUB HOMINE SED SUB DEO ET LEGE

Respectfully submitted,

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FILED
MAR 7
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

72-950

CLYDE W. REED - - - - - Petitioner

versus

JEAN MOORE REED - - - - Respondent

RESPONDENT'S MOTION FOR REASONABLE DAMAGES UNDER RULE 56(4)

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

72-950

CLYDE W. REED - - - - - *Petitioner*

v.

JEAN MOORE REED - - - - *Respondent*

RESPONDENT'S MOTION FOR REASONABLE DAMAGES UNDER RULE 56(4)

Respondent, through her counsel, respectfully moves the Court pursuant to the provisions of Supreme Court Rule 56(4) to adjudge to her reasonable damages for her delay,[1] occasioned by the petition for certiorari filed by petitioner on the ground that it appears from the record, the petition, the brief in opposition, and the respective appendices to the petition and the brief in opposition, there was no ground for granting such a writ, and in support thereof states the following:

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[1]The Court of Appeals of Kentucky stayed enforcement of its Mandate dated October 12, 1972, for 90 days from October 25, 1972 (Petition, Appendix E, p. 89). On January 16, 1973, it entered an order granting an additional stay to and including March 23, 1973.

NO GROUND FOR GRANTING SUCH A WRIT

This Court denied the petition for a writ of certiorari on February 20, 1973. The record before this Court together with the brief (and appendix) and the brief in opposition (and appendix) clearly establish that there was no ground for granting such a writ; that the writ was frivolous and sought merely for purposes of delay.

A petition for certiorari arising out of a monetary award to a wife in a divorce action should be particularly suspect of being without ground for review by this Court and frivolously imposed for purposes of delay. Compare *Bohn* v. *Bohn,* 316 U. S. 646, 62 S. Ct. 1283.

REASONABLE DAMAGES SHOULD BE IMPOSED AS A MATTER OF POLICY

The Respondent does not believe it necessary to cite case load statistics to this Court. However, we do call the Court's attention to the opinion in the 1879 case of *Whitney* v. *Look,* 99 U. S. 607, where the following was stated:

> "Our experience teaches that the only way to discourage frivolous appeals and writs of error is by the use of our power to award damages, and we think this is a proper case in which to say that hereafter more attention will be given to that subject, and the rule enforced both according to its letter and spirit. Parties should not be subjected to the delay of proceedings for review in this court

without reasonable cause, and our power to make compensation to some extent for the loss occasioned by an unwarranted delay ought not to be overlooked."

RESPONDENT SUSTAINED SUBSTANTIAL DAMAGES BY REASON OF THE DELAY ATTRIBUTABLE TO THE PETITION FOR THE WRIT

The divorce judgment (Petition, Appendix "A", p. 46) awarded the Respondent $25,000.00 per year commencing February 7, 1970, for a period of 10½ years, and expressly provided that such payments were to be taxable to the Respondent and deductible to the Petitioner. The first two payments of $25,000.00 each (due 2/7/71 and 2/7/72) were superseded in the trial court in conjunction with petitioner's appeal to the Court of Appeals of Kentucky from the trial court's order denying his motion to set aside portion of the judgment. An additional installment of $25,000.00 became due on February 7, 1973. The Court of Appeals' original stay of its October 12, 1972 mandate for ninety (90) days from October 25, 1972, will cause Respondent to receive three (3) annual payments of $25,000.00 each during the calendar year 1973.

The Petitioner will be entitled to a full federal income tax deduction for the $75,000.00 payments he will make during 1973, and the Respondent will be required to report the entire $75,000.00 payments as taxable income in her 1973 federal income tax return. *Holahan* v. *C.I.R.* (C.A. 2, 1955), 222 F. 2d 82. Because alimony payments are not "earned income" as defined in 26 U.S.C.A. 1348(b)(1), the fifty percent (50%)

maximum rate on earned income under 26 U.S.C.A. 1348(a) will not apply to the $75,000.00 alimony payments, and Respondent will be subject to a tax rate of seventy per cent (70%)[2] on her net taxable income in excess of $38,000.00.

REASONABLE DAMAGES ARE $5,000.00

The proceedings in this Court gave Petitioner grounds to obtain a stay of the 1972 mandate of the Court of Appeals of Kentucky until January, 1973. This was done, and as a result Respondent will be required to report $75,000.00 of alimony income subject to a maximum tax rate of 70% for the calendar year 1973.

The additional federal income tax that Respondent will have to pay by reason of the delay directly resulting from the writ filed by Petitioner in this Court is $5,000.00 (20% x $25,000.00).

Reasonable damages under Rule 56(4) are not less than $5,000.00.

Respectfully submitted,

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[2]Respondent will file as "head of household" for calendar year 1973.

CERTIFICATE

I certify that I am a member of the bar of the United States Supreme Court; that I have entered my appearance as counsel for Respondent in accordance with the rules; and that I have served 3 copies of the foregoing Respondent's Motion For Reasonable Damages Under Rule 56(4) upon Honorable John C. Lovett, Lovett and Lewis, Post Office Box 165, Benton, Kentucky 42025, said address being within 500 miles from that of the undersigned, by depositing same in the United States Post Office at Hopkinsville, Kentucky, first class, postage prepaid, on March 6, 1973, all in accordance with Rule 33(1) of the Rules of the United States Supreme Court.

Dated this 6 day of March, 1973.

William E. Scent

WILLIAM E. SCENT
KEITH, SCENT, KIRKHAM & WALTON
317 West 9th Street
Hopkinsville, Kentucky 42240

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

72-950

CLYDE W. REED - - - - - *Petitioner*

v.

JEAN MOORE REED - - - - *Respondent*

PETITIONER'S RESPONSE TO RESPONDENT'S MOTION FOR REASONABLE DAMAGES UNDER RULE 56(4)

For response to Respondent's motion under Rule 56(4) for the award of reasonable damages for delay,[1] Petitioner respectfully submits that the motion should be denied for the following reasons:

I

The Petition for Writ of Certiorari Was Not Dilatory or Frivolous

Rule 56(2) provides that if an *appeal* appears to have been sued out for delay, damages at a rate "not exceeding 10 per cent" may be adjudged by the Court. This applies to appeals, not to petitions for writ of certiorari.

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[1]The motion, with undated certificate of service, was received by Petitioner's counsel on March 7, 1973.

Rule 56(4) applies to petitions for certiorari. It empowers this Court "in appropriate cases" to adjudge to respondent reasonable damages for his delay if there appears to be no grounds for granting the writ.

Petitioner does not know why his petition was denied. However, it is clear that

> The denial of a writ of certiorari imports no expression of opinion on the merits of the case as the bar has been told many times. *United States* v. *Carver*, 260 U. S. 482, 67 L. Ed. 361, 364, 43 S. Ct. 181.

This is not "an appropriate case" for adjudging damages. Petitioner did not file his petition for certiorari for purposes of delay. Rather, it was a good faith effort to obtain a judicial hearing on his motion, based upon changed circumstances and changes in the law, to modify the largest divorce judgment in the history of Kentucky. He believed that refusal of such a hearing denied procedural due process. In this connection, it should be noted that

> (a) Two of the seven judges on Kentucky's highest court, in a vigorous dissent, declared that the original judgment was erroneous and violative of a plainly written statute.
>
> (b) One of the seven judges, in a dissent, declared that the denial of a hearing on Clyde's motion to modify the judgment was "defective in so many respects" and was contrary to all precedent in Kentucky.

(c) One judge, a member of the majority of the Court, entered a 90 day stay order pending the filing of the petition for certiorari. It is unlikely that he would have done so if he had regarded the petition as dilatory or frivolous.

(d) Five judges extended the stay order until March 23, 1973. It is unlikely that they would have done so if they had regarded the quest for judicial review of their opinion as frivolous or dilatory.

Under these circumstances, and considering the amount involved, Petitioner submits that he would have been remiss if he had declined to exhaust every available legal remedy in an effort to obtain a simple hearing on his motion to modify.

II

Respondent Seeks to Pyramid Damages

We know of no instance in which this Court has regarded its power to adjudge damages as a weapon to discourage the filing of legitimate and good faith petitions. The right to seek judical review is too firmly embedded in our system of jurisprudence to be denied by the threat of imposing exemplary or punitive damages.

Here, Respondent already is well protected against loss. As Respondent says in her motion, two of the $25,000 payments were superseded in the trial court. Petitioner, therefore, already is absolutely liable for a minimum of 10% damages (or $5,000) under Kentucky

law. KRS 21.130. In addition, she will receive interest approximating $4,875.00.

Collection of the 1973 installment of $25,000, due on February 7, 1973, has not been delayed. In fact, on February 17, 1973, while the petition was still pending in this Court, Respondent had a Writ of Fieri Facias (Execution) issued to enforce collection of this installment. A copy of that Writ is attached hereto as Appendix A.

Respondent seeks to superimpose 10% damages on $50,000 in this Court on the 10% damages on $50,000 she will automatically receive under KRS 21.130. We respectfully submit that an allowance of damages of 20% for delay in collecting the two payments would be exhorbitant and punitive.

This is not all. Despite issuance of execution, Respondent undoubtedly will request the Kentucky Court of Appeals to award her an additional 10% damages (under KRS 21.130) on the $25,000 installment which came due on February 7, 1973, on the theory that the stay order entered by the Kentucky Court of Appeals constituted a supersedeas. If she succeeds, the reward to her and the penalty to Petitioner will increase by $2,500.

WHEREFORE, Petitioner respectfully submits that Respondent's Motion should be denied.

Respectfully submitted,

JOHN C. LOVETT
LOVETT AND LEWIS
P. O. Box 165
Benton, Kentucky 42025
Attorneys for Petitioner

CERTIFICATE

I certify that I am a member of the bar of the United States Supreme Court; that I have entered by appearance as counsel for Petitioner in accordance with the Rules of this Court; and that I have served three (3) copies of the foregoing Response upon Honorable William E. Scent, Keith, Scent, Kirkham and Walton, 317 West 9th Street, Hopkinsville, Kentucky 42240, and upon Honorable L. M. Tipton Reed, Neely, Reed and Bryan, Lawpart Building, Mayfield, Kentucky 42066, attorneys for Respondent, by depositing same in a United States Post Office, first class mail, postage prepaid, (said addresses being within 500 miles from that of the undersigned) on March 15, 1973, all in accordance with Rule 33(1) of the Rules of the United States Supreme Court.

Dated this 15th day of March, 1973.

John C. Lovett

JOHN C. LOVETT
LOVETT AND LEWIS
P. O. Box 165
Benton, Kentucky 42025

APPENDIX A

MARSHALL CIRCUIT COURT

Civil Action No. 2047

JEAN MOORE REED - - - - - - - *Plaintiff*

v.

CLYDE W. REED - - - - - - - *Defendant*

WRIT OF FIERI FACIAS (EXECUTION)

The Commonwealth of Kentucky,

To the Sheriff of Marshall County, Greeting:

We command you that of the estate of CLYDE W. REED you cause to be made the sum of Twenty-Five Thousand Dollars ($25,000.00) with interest thereon, at the rate of six percent (6%) per annum, from the 7th day of February, 1973, until paid, which JEAN MOORE REED late in our Marshall Circuit Court has recovered against CLYDE W. REED for alimony, whereof the defendant, CLYDE W. REED, convicted as appears to us of record, and that you have the said sums of money before our court on Friday, April 6, 1973, to render to the said JEAN MOORE REED her alimony, interest and costs aforesaid, and have then and there this writ.

Witness, W. J. BRIEN, JR., clerk of the Marshall Circuit Court, this 17 day of February, 1973.

(s) W. J. BRIEN, JR.
Clerk